Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012	)	WT Docket No. 19-250
	)	RM-11849
	)	
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79
	)	
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	

JOINT COMMENTS OF CITY OF SAN DIEGO, CAL.; CITY OF BEAVERTON, OR.; CITY OF BOULDER, COLO.; TOWN OF BRECKENRIDGE, COLO.; CITY OF CARLSBAD, CAL.; CITY OF CERRITOS, CAL.; COLORADO COMMUNICATIONS AND UTILITY ALLIANCE; CITY OF CORONADO, CAL.; TOWN OF DANVILLE, CAL.; CITY OF ENCINITAS, CAL.; CITY OF GLENDORA, CAL.; KING COUNTY, WASH.; CITY OF LACEY, WASH.; CITY OF LA MESA, CAL.; CITY OF LAWNDALE, CAL.; LEAGUE OF OREGON CITIES; LEAGUE OF CALIFORNIA CITIES; CITY OF NAPA, CAL.; CITY OF OLYMPIA, WASH.; CITY OF OXNARD, CAL.; CITY OF PLEASANTON, CAL.; CITY OF RANCHO PALOS VERDES, CAL.; CITY OF RICHMOND, CAL.; TOWN OF SAN ANSELMO, CAL.; CITY OF SAN MARCOS, CAL.; CITY OF SAN RAMON, CAL.; CITY OF SANTA CRUZ, CAL.; CITY OF SANTA MONICA, CAL.; CITY OF SOLANA BEACH CAL.; CITY OF SOUTH LAKE TAHOE, CAL.; CITY OF TACOMA, WASH.; CITY OF THOUSAND OAKS, CAL.; THURSTON COUNTY, WASH.; CITY OF TUMWATER, WASH.

Comment Date: October 29, 2019

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY

The joint commenters (collectively, the "Western Communities Coalition") respectfully submit these comments in response to the Commission's public notice[1] seeking comments on the petitions for declaratory rulings and petition for rulemaking submitted by the Wireless Infrastructure Association ("WIA") and the Cellular Telephone Industry Association ("CTIA").[2] The Wester Communities Coalition positions on these issues are summarized as follows:

Due Process Concerns. The numerous vague and unsubstantiated allegations against local governments upon which Petitioners rely to support their proposed changes to the rules raise significant due process concerns because they fail to provide sufficient notice and opportunity for maligned communities to respond. In light of the demonstrated inaccuracy of some of the allegations against named communities, the lack of an opportunity to respond to allegations against unnamed communities is an even more significant due process problem. This defect also runs counter to Commission preferred procedure for how to introduce competent evidence into the record. The Commission should not rely on these unsupported anecdotes in its pursuit of reasoned rulemaking.

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[1] *Wireless Telecommunications Bureau and Wireline Competition Bureau Seek Comment on WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling and CITA Petition for Declaratory Ruling*, DA 19-913 (Sep. 13, 2019) [hereinafter "Public Notice"].

[2] In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WIA Petition for Declaratory Rulemaking, WT Docket No. 17-79 (Aug. 27, 2019) [hereinafter "WIA Decl. R. Petition"]; In the Matter of Petition for Rulemaking to Accelerate Wireless Broadband Deployment by Amending the Rules Implementing Section 6409 of the Spectrum Act, RM-11849 (Aug. 27, 2019) [hereinafter "WIA RM Petition"]; In re Accelerating Broadband Deployment by Removing Barriers to Infrastructure Investment, CTIA Petition for Declaratory Rulemaking, WT Docket No. 17-79, WC Docket No. 17-84 (Sep. 6, 2019) [hereinafter "CTIA Petition"].

Shot Clock Rules, Procedures and Remedies. Clear and sensible shot clock rules are important to streamline modification applications consistent with the statute and local resources. Unfortunately, the Petitions proposed clarifications miss the mark.

The current 60-day shot clock and submittal rules already accomplish the goals embodied in Section 6409(a). Modifications are already being approved within the current timeframes and WIA's and CTIA's proposals would introduce more subjectivity and ambiguity that will confuse applicants and permit authorities alike. WIA also asks the Commission to impose a written findings requirement under Section 6409(a) that is more burdensome than that required under Section 332(c)(7)(B) and to preempt the open-meeting processes in which some local governments choose to conduct their business. Most importantly, both Petitioners advocate for a remedy so extreme that no public health and safety official would recognize as sound policy.

The Commission should find that there is no basis in the law or record to justify these misguided proposals. The proposed shot clock rules would make the process more confusing and threaten local ability to enforce longstanding public health and safety standards.

Substantial Change Issues.

Concealment. Petitioners advance arguments to narrow the scope of the concealment elements of the rules. However, the term "concealment elements" refers to the particularized steps the parties take to mitigate the aesthetics harms

of a facility not simply a facility's overall appearance. The Petitioners' proposed rules would expand the scope of eligible facilities requests by ignoring that changes in size and scale can undermine and therefore defeat concealment of the structure. This interpretation runs counter to both the rule's plain language and congressional intent. These significant changes to the rule would expose parties who have deployed camouflaged sites in reliance on the current rules and raise significant questions over the retroactive effects of the proposal.

The rules adopted in the *2014 Infrastructure Order* balanced the legitimate interests in both accelerated deployments and community aesthetics. Because the proposed changes to the rules would inject uncertainty into whether initially concealed facilities will remain concealed, particularly in sensitive areas, the changes proposed by Petitioners would jeopardize deployment, not facilitate it.

Equipment Cabinets. CTIA suggests that the Commission ignore its own tested rules regarding the number of equipment cabinets, gut the current and clear number of cabinets that do not trigger a substantial change, and replace it with an entirely new, untested and unlimited number. This proposal defies the commonly understood definition for an "equipment cabinet". The practical impact of CTIA's proposal is to entirely eliminate the current numerical value set without offering any reasonable substitute other than its intended result that no limit is a good limit.

Permit Compliance. The Commission should also reject WIA's request to limit the permit compliance substantial change factor to modifications that *cause* non-

compliance with prior conditions. This proposal and rationale runs contrary to good governance and would put public health and safety at risk. Modification plans that show permit violations would plainly "not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment," and approving sealed plans with knowing inaccuracies would violate professional licensing standards. Accordingly, the Commission should reinforce its commitment to preserving State and local authority to require compliance with prior permit conditions and other applicable rules as a precondition to approving an eligible facilities request.

Antenna Height Separation. WIA requests a clarification to the antenna separation rule that would not resolve the existing ambiguity: that the Commission re-promulgate the same rule from 2014. To the extent that applicants and permitting agencies have adopted different interpretations over the intervening years, the prudent action would be to amend the rule for consistency with the height limitation for towers in the public rights-of-way and base stations. This approach already has support in the *2014 Infrastructure Order* and in common sense. Given that a fixed minimum best serves Congressional intent, and that there is no record evidence that the fixed standard for towers outside the public rights-of-way and base stations has caused similar confusion, applicants and local governments would be well-served to simplify the rule for towers on private property to mirror the rule other eligible support structures.

Compound Expansions. WIA's proposal to create an un-rebuttable presumption approving 30-foot compound expansions appears to be anticipating a problem for which it has no evidence exists in the context of Section 6409(a). The current rule already restricts new transmission equipment to the space "leased or owned" by the site operator at the time it requests approval. WIA cites industry sources that fail to show whether any local government actually denied or delayed compound expansion, whether the compound expansions even implicated questions that Section 6409(a) was intended to resolve, or whether the 30-foot proposal is consistent with the examples of compound expansions it provides. In addition to recognizing these factual deficiencies, the Commission should reject the proposal because it already considered these issues in prior proceedings and the nature of tower modifications and compound expansions has not changed to justify a policy reversal.

Backup Power. The Commission should find no reason to clarify rules related to backup power supplies. There is no evidence to suggest that WIA's allegation that the existing Section 6409(a) rules are insufficient to address collocations of emergency generators. Generators are already included in the definition of transmission equipment and the existing rules provide sufficient remedies so long as the equipment complies with the substantial change criteria.

Compliance with Objective Public Health and Safety Requirements. Commission action to preempt local setbacks based on sweeping generalizations from WIA has no basis in fact or law. Local setbacks could serve a variety of

purposes depending on the context. Broad claims that they do not relate to public safety are hardly persuasive and contrary to Supreme Court precedent and land use and building codes. Where a local regulation lives in a municipal code does not necessarily limit its purpose. Organizational structure often reflects the local government's judgement as to which department should administer the regulations and at what stage in the development process compliance should be assessed. Commission preemption here would represent a significant shift in its stated policy that Section 6409(a) does not preempt objective health and safety regulations. Whether a setback or fall zone requirement existed before or after the initial deployment, the record does not support preemption to the extent such requirement is objective and rationally relates to public health and safety.

Conditional Approvals. Conditional approvals are not, as the Petitions suggest, tantamount to a denial. Section 6409(a) does not require local governments to *unconditionally* approve EFRs, and the Commission should reject proposals to preempt conditional approvals. Moreover, WIA falsely or misleadingly maligns communities for behavior that is consistent with the *2014 Infrastructure Order*, such as separating regulatory from proprietary functions and requiring continued compliance with generally applicable laws related to public health and safety. The Commission should reject this request.

Application Requirements. The Commission should reject proposals by WIA to further restrict application materials required to process eligible facilities requests and related permits and approvals. The deployment process involves more

than merely a determination as to whether an application tendered as an eligible facilities request involves a collocated, modified or replaced transmission equipment on an existing wireless tower or base station without a substantial change in its physical dimensions. After that initial determination, local officials must still check for compliance with non-discretionary codes reasonably related to health and safety, including building and structural codes. The *2014 Infrastructure Order* correctly recognized that an eligible facilities request may require more than one permit or approval before construction may commence. Any restrictions on certain application requirements must not prohibit documentation needed to demonstrate compliance with all applicable codes that govern the application.

Compliance with RF Exposure Guidelines. The Commission should reject any insinuation by WIA that state and local governments cannot evaluate a proposed modification to an existing wireless tower or base station for compliance with the Commission's guidelines for RF exposure. Neither the plain language in the Communications Act nor the Commission's precedents so much as suggest that local public agencies may not question whether a proposed or existing personal wireless service facility complies with applicable RF exposure standards. Concerns raised about "local approval" are really nothing more than a local requirement demonstrating compliance with federal standards—something the Commission has previously recognized is within the authority of local governments to consider. Accordingly, the Commission should decline to reverse its prior decisions and

continue to require that eligible facilities requests demonstrate actual compliance with the Commission's own RF exposure guidelines.

Cost-Based Fees. State law already requires local governments to process permit applications using cost-based fees. The comments in the prior infrastructure proceedings related to regulatory fees for permit applications are equally applicable in this context.

INTERESTS OF THE COMMENTERS

City of Beaverton, Oregon, was incorporated in 1893. Beaverton has always been a city that prides itself on being a pioneer. As an early adopter of automobiles, airplanes, and film, Beaverton welcomes wireless utilities improvements. However, the City must be able to review eligible facilities requests for compliance.

City of Boulder, Colorado, is a home rule municipal corporation organized under the laws of the State of Colorado. Boulder is located approximately 25 miles northwest of Denver at the base of the foothills of the Rocky Mountains and encompasses 25 square miles. As of 2018, the population of the City was estimated to be approximately 108,507 persons. The City has a diverse economy and is home to many high-tech companies, federal research laboratories, and the University of Colorado.

Town of Breckenridge, Colorado, is a home rule municipality located in Summit County, Colorado approximately 80 miles west of Denver. Breckenridge is the county seat and the most populous municipality in the county with a population of 4,540. The town sits at the base of the Rocky Mountains' Tenmile Range and is known for its world class ski resort, year-round alpine activities, and Gold Rush history.

City of Carlsbad, California, home of the Legoland and the first modern skatepark, Carlsbad was incorporated in 1952. With an estimated population of 115,000, Carlsbad has four distinct quadrants, each with their own unique

neighborhoods. As home to many information technology companies, Carlsbad knows the importance of wireless facilities. Yet, to maintain Carlsbad's unique neighborhoods and ensure public safety, the City must be allowed to review all eligible facilities requests for compliance.

City of Cerritos, California, was incorporated in 1956. Originally master planned as a park-like community, with 3.2 acres of park land per 1,000 residents, Cerritos residents and business owners alike take pride in maintaining the aesthetic quality of the City. Located in the heart of the Los Angeles/Orange County metro center, Cerritos has become one of Southern California's premier commercial crossroads and has been awarded the Most Business-Friendly City Award by the Los Angeles County Economic Development Corporation. The City continuously partners with private industry to facilitate new developments that meet business objectives while maintaining the City's high-quality community character. Accordingly, the City partnered with wireless industry representatives during the last major update of its wireless facility ordinance to set forth smart, results-oriented policies and practices. The ability to review eligible facilities requests for compliance is mandatory for protecting the City's vibrant, carefully planned environment.

Colorado Communications and Utility Alliance ("CCUA"), was formed as a Colorado non-profit corporation in 2012 and is the successor entity to the Greater Metro Telecommunications Consortium. Its members are municipalities, counties, school districts, regional government organizations and a state agency

currently totaling 65 entities and representing most of Colorado's population, and have been working together since 1992 to protect the interests of their communities in all matters related to local telecommunications issues. The CCUA undertakes education and advocacy in areas such as siting of wireless communications facilities, cable franchising and regulation, broadband network deployment, public safety communications, rights-of-way management, and operation of government access channels. The CCUA is the Colorado chapter of the National Association of Telecommunications Officers and Advisors ("NATOA") and an affiliate of the Colorado Municipal League.

City of Coronado, California, was incorporated in 1890, with the intention of being a resort community. The City of Coronado is a small coastal city with occupies approximately 7.7 square miles of land area. The city is entirely within the Coastal Zone and are subject the Coastal Act. The Coastal Act requires protections and preservation of view corridors. Thus, camouflaging and unobtrusive design for any facility is integral. Every addition to the city's infrastructure impacts the aesthetic. Keeping Coronado's beaches and views unmarred is integral to the economy of the city. It is paramount that Coronado retains the ability to review eligible facilities requests for that reason.

Town of Danville, California, voted the safest city in California, Danville was incorporated in 1982. Danville boasts 14 parks as well as the Eugene O'Neill National Historic Site. Preserving the quality of these points of interest as well as

maintaining the standard of safety mandates that the town must be able to review all eligible facilities requests.

City of Encinitas, California, incorporated in 1986, Encinitas encompasses the communities of Historic Encinitas, New Encinitas, Leucadia, Cardiff-by-the-Sea, and Olivenhain. With an estimated population of 63,000, Encinitas still retains the personality and charm of its various communities. Maintaining the unique character of these communities is integral to Encinitas, both economically and aesthetically. While the City acknowledges the importance of wireless facilities, the City has a vested interest in reviewing all eligible facility requests to insure they comply with FCC guidelines.

King County, Washington, is located on Puget Sound in Washington State, and covers 2,134 square miles, making it nearly twice as large as the average county in the United States. With more than 2 million people, it also ranks as the 14th most populous county in the nation.

City of La Mesa, California, founded in 1869 but not incorporated until 1912, La Mesa's civic motto is "the Jewel of the Hills." With approximately 200,000 people attending La Mesa's annual Oktoberfest event, La Mesa understands and appreciates the value of wireless facilities. However, it is integral for the City to be able to review eligible facilities requests to maintain the efforts put into already existing concealment.

City of Lacey, Washington, recently named to Money Magazine's "100 Best Places to Live in America" list, with a population of 51,170, Lacey is the largest city

in Thurston County. Home to historic St. Martin's University, Lacey was one of the first "Tree City USAs" in the state of Washington, and one of the first EPA "Green Power Communities" in the entire nation. Known for its natural wooded environment, nearly 20 percent of the city has been set aside for parks, natural areas, and open space.

The League of Oregon Cities originally founded in 1925, is an intergovernmental entity consisting of all Oregon's 241 incorporated cities that was formed to be, among other things, the effective and collective voice of Oregon's cities before the legislative assembly and state and federal courts.

The League of California Cities is an association of 478 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents, and to enhance the quality of life for all Californians. The League of California Cities is a nonprofit corporation which does not issue stock, and which has no parent corporation, nor is it owned in any part by any publicly held corporation.

City of Lawndale, California, was incorporated in 1959 and has an estimated population of 32,750. With a total area of only 1.97 square miles, the City is very cognizant of any changes. Lawndale must retain the right to review eligible facilities requests to protect the efforts the City has made in concealments and public safety.

City of Napa, California, is a municipality founded over 170 years ago. Located north of the San Francisco Bay, Napa spans over 18 square miles of land,

has a population of about 80,000 residents, and hosts over 3 million tourists from around the world who visit the world-renowned wineries, farms, and ranches along with other regional attractions. The City of Napa participates in this comment process to refute and rebut various WIA and CTIA allegations, and to help provide a correct record for the Commission to consider. The City of Napa is a municipal corporation organized under the laws of the State of California.

City of Olympia, Washington, located at the southern tip of the Puget Sound, Olympia is Washington State's capital city. It is both the heart of state government and the cultural center of the southern Puget Sound Region. With a population of more than 52,400 residents, Olympia prides itself on its quirky, smart, artistic vibe.

City of Oxnard, California, is a municipality founded over 120 years ago. Located along the Pacific Ocean between Los Angeles and Santa Barbara, incorporated Oxnard exceeds 39 square miles of land, has a population of about 210,000 residents. Oxnard is famous for its renowned wineries, farms, and ranches along with other regional attractions. The City of Oxnard participates in this comment process to refute and rebut various WIA and CTIA allegations, and to help provide a correct record for the Commission to consider. The City of Oxnard is a municipal corporation organized under the laws of the State of California.

City of Pleasanton, California, is a municipality founded about 145 years ago. Located in Alameda County, Pleasanton exceeds 24 square miles of land, has a population of over 80,000 residents. Pleasanton is a community that lies along the

route of the first Transcontinental Railroad. The City of Pleasanton participates in this comment process to refute and rebut various WIA and CTIA allegations, and to help provide a correct record for the Commission to consider. The City of Pleasanton is a municipal corporation organized under the laws of the State of California.

City of Rancho Palos Verdes, California, is a municipality founded in 1973. Located in Los Angeles County with vistas of the Pacific Ocean, Rancho Palos Verdes contains about 13½ square miles of land and has a population of over 41,000 residents. Rancho Palos Verdes is known as a quiet residential community sitting on a bluff above cliffs connecting the bluff to the Pacific Ocean. The City of Rancho Palos Verdes participates in this comment process to refute and rebut various WIA and CTIA allegations, and to help provide a correct record for the Commission to consider. The City of Rancho Palos Verdes is a municipal corporation organized under the laws of the State of California.

City of Richmond, California, is a municipal corporation chartered in 1909. Located on the shore of the San Francisco Bay, Richmond spans approximately 55 square miles of land and has a population of approximately 119,000 residents. It is one of the cities negatively identified by WIA because that city charges its full cost to process wireless siting applications and issue permits, including EFR applications, and the fee exceeds the Commission's safe harbor per-application and permit issuance fee. The City of Richmond participates in this comment process to address and rebut WIA's allegations, and to provide a correct record.

Town of San Anselmo, California, is a municipal township founded over 110 years ago. The Town of San Anselmo is a small community of just 2.68 square miles cross by three main roads. The Town of San Anselmo participates in this comment process to refute and rebut various WIA and CTIA allegations; to recognize that communities and their character can be disrupted by a proliferation of EFR applications, and to help provide a more complete and correct record for the Commission to consider. The Town of San Anselmo is a municipal corporation organized under the laws of the State of California.

City of San Diego, California, established in 1769, San Diego has been called "the birthplace of California." As the second largest city in California, with an estimated population of 1.4 million people, San Diego represents a significant share of California's wireless subscribers. The City has been at the forefront of wireless policy and design since the late 1980s, and City experts assigned to the discipline understand the value of wireless utilities. One of San Diego's largest economic sectors is defense, which requires cutting edge wireless capabilities. However, another major industry in San Diego is tourism. From beaches to Balboa Park, the tourism industry provides jobs for more than 160,000 people. It is crucial that San Diego retain the right to review eligible facility requests to prevent any damage to their tourism industry.

Wireless devices have become an essential part of our lives, and San Diego recognizes that the wireless industry provides an important public service that necessitates the ability to respond quickly to consumer demand. Therefore, San

Diego considers it essential to act on eligible facilities requests within the established shot-clock. San Diego has approved approximately 470 applications for eligible facilities requests since April 8, 2015, and is currently in the process of reviewing 99 additional applications. Despite this proven track record of Spectrum Act compliance, San Diego is one of the cities negatively identified by WIA because San Diego does not accord EFR treatment to sites that have been modified by the carrier without proper city authorization; and also for requiring RF compliance reports for EFR applications where RF emissions will change; and for maintaining an orderly and manageable permit process. San Diego is participating in this comment process to ensure that any decisions made by the Commission are based on an accurate record and not inaccurate statements of San Diego's policies and procedures.

City of San Marcos, California, was incorporated in 1963, and chartered in 1994. San Marcos is a city with many diverse industry groups and educational institutions. As such, San Marcos understands the value of reliable wireless utilities. It has a population exceeding 96,000 residents. It is one of the cities negatively identified by WIA because San Marcos requires RF compliance reports for EFR applications where the RF emissions will change. The City of San Marcos participates in this comment process to address and rebut WIA's allegations, and to provide a correct record.

City of San Ramon, California, was incorporated in 1983 and has an estimated population of 76,000 within its approximately 18½ square-mile

boundaries. San Ramon prides itself in its forward thinking and planning, as exemplified by Bishop Ranch office park and city center. The City of San Ramon participates in this comment process to refute and rebut various WIA's and CTIA allegations, to preserve local control over issues that concern its citizens and its infrastructure, and to help provide a correct record for the Commission to consider.

City of Santa Cruz, California, is a municipality founded over 150 years ago. Santa Cruz contains nearly 16 square miles, has a population of about 65,000 residents. It is a seaside community famous for its boardwalk, its arts community, and for its tourism. Equally important is that it is a major university community and scientific research center. Santa Cruz participates in this comment process to refute and rebut various WIA and CTIA allegations, and to help provide a correct record for the Commission to consider. Reviewing eligible facility requests allows Santa Cruz to maintain its interest in protecting the health, safety, and welfare of its citizens and the general public.

City of Santa Monica, California, incorporated in 1886, and located on the shore of the Pacific Ocean in Los Angeles County, Santa Monica contains over 8.4 square miles of land, has a population exceeding 92,000 residents, and hosts over 8 million tourists from around the world each year who visit the famous Santa Monica Pier and other regional attractions. The Santa Monica Looff Hippodrome, located on the iconic Santa Monica Pier, is a National Historic Landmark. The Downtown District is home to a vibrant, pedestrian-only shopping area that goes on for three blocks. The City of Santa Monica participates in this comment process to

refute and rebut various WIA and CTIA allegations, and to help provide a correct record for the Commission to consider. Santa Monica must be able to review eligible facility requests so that the City may maintain its cultural landmarks and economic resources.

City of Solana Beach, California, was incorporated in 1986 and is a city with an area of 3.62 miles and has a population exceeding 13,000 residents. The city is entirely within the Coastal Zone and are subject the Coastal Act. The Coastal Act requires protections and preservation of view corridors. Thus, camouflaging and unobtrusive design for any facility is integral. Every addition to the city's infrastructure impacts the aesthetic. It is one of the cities negatively identified by WIA for requiring RF compliance reports for EFR applications where RF emissions will change. The city has devoted substantial resources to maintaining the beauty of the city and its beaches. It is imperative that the city be able to review eligible facility requests to ensure the investment in concealment is protected.

City of South Lake Tahoe, California, is a municipality incorporated in 1965. Located at an elevation of 6,200 feet in the Sierra Nevada mountains on the south shore of Lake Tahoe, South Lake Tahoe spans over 16 square miles of land and has a population of over 20,000 residents, and annually hosts millions tourists from around the world who visit Lake Tahoe and the region. The City of South Lake Tahoe participates in this comment process to refute and rebut various WIA's and CTIA allegations, and to help provide a correct record for the Commission to consider. The City of South Lake Tahoe recognizes the need for wireless facilities to

serve its residents, tourists, and public safety communication systems, but needs to be able to review eligible facility requests to ensure they do not impact the city's unique scenic and environmental resources.

City of Tacoma, Washington, is located on the south end of Puget Sound, and is home to the sixth largest container port in North America. Named one of America's most livable communities, Tacoma is comprised of approximately 49 square miles and has a population of over 200,000 people.

City of Thousand Oaks, California, is a municipal corporation founded in October 1964. Located in the Conejo Valley portion of Ventura County in Southern California, Thousand Oaks spans approximately 55 square miles of land and has a population of approximately 129,000 residents. It is one of the cities negatively identified by WIA because that city carefully follows both the words and intent set out in Section 1.6100(b)(7)(iii). The City of Thousand Oaks participates in this comment process to refute and rebut WIA's allegations, and to provide a correct record.

Thurston County, Washington, is home to more than 282,000 residents, and is home to the Washington State's capitol city, Olympia. It is the eighth most populated county among Washington State's 39 counties. Thurston County is located at the southern end of Puget Sound in the Pacific Northwest and is 727 square miles in area. Thurston County is 60 miles south of Seattle, Washington and is 100 miles north of Portland, Oregon.

City of Tumwater, Washington, is the oldest American settlement on Puget Sound, founded in 1845, and incorporated in 1869. Tumwater is nearly 18 square miles and with a population of about 23,830 residents is the 44th largest in the state. More than a dozen state office buildings are located in Tumwater, employing over 15,000 people. Founded in an area chosen for its many natural resources, rivers, prairies, forests and beaches, Tumwater is rich in history, community and opportunity, and continues to be a desirable location to work and live.

COMMENTS

I. DUE PROCESS CONCERNS

The Petitioners lob numerous, unsupported—and often demonstrably false—claims against local governments. Many anecdotes lack even the most basic information needed to identify which community allegedly engaged in misconduct. Where the Petitioners deign to name the communities they accuse, those entities have the opportunity to respond and in most cases, demonstrate the falsity of the allegations.[3] This highlights the problem with the Commission's reliance on the many unsupported claims Petitioners use to substantiate the arguments advanced in their filings. Without the opportunity to verify these claims and allow local governments to respond to the allegations, the fundamental fairness of the proceeding is compromised and real concerns over the lack of due process afforded the participants are raised.[4]

In their petition, WIA accuses "some localities"[5] of a laundry list of violations and provides as their only support citations to previously submitted *ex parte*

[3] For example, WIA claims that the City of SeaWorld, California is frustrating the goals of Section 6409(a). *See* WIA Decl. R. Petition at 10 (citing Letter from Kenneth J. Simon, Crown Castle International Corp., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (Aug. 10, 2018) ("2018 Crown Castle *Ex Parte* Letter"). However, Western Communities Coalition can find no record that such a city even exists, which raises questions whether WIA believes that a non-governmental corporate entity is a "State or local government" within the meaning of the statute. See 47 U.S.C. § 1455(a)(1). The League of California Cities, which keeps a registrar with all California cities, also has no record that such a city exists. *See Alphabetical List of California Cities*, League of California Cites (Aug. 22, 2011), https://www.cacities.org/Resources/Learn-About-Cities/Alphabetical-List-of-Cities.aspx (omitting "SeaWorld" from the comprehensive list).

[4] *See Pickus v. U.S. Bd. of Parole*, 543 F.2d 240, 243 (D.C. Cir. 1976) ("Although informal rulemaking does not necessarily inflict 'grievous loss' on individuals, its results do sufficiently impinge on their lives and rights to require some conformance with notions of due process.");*see also id.* at 243 n.10.

[5] WIA Decl. R. Petition at 3–5, 8, 10, 13–20, 22.

filings,[6] which also fail to describe with specificity and concreteness the basis for the allegations. CTIA similarly accuses "some localities" of various acts without adequate support.[7] These broad, vague, and unsupported conclusory accusations provide no meaningful opportunity for local governments to respond to these claims because they lack key details. Importantly, they are inconsistent with the Commission's prior announcements for notifying jurisdictions whose laws, regulations or practices are allegedly prohibiting the ability to provide service.

In the past, the Commission advised commenters in advance that allegations involving unnamed parties are not helpful. For example, the Commission noted:

> In the case of comments that name any state or local government or Tribal or federal entity as an example of barriers to broadband deployment, we strongly encourage the party submitting the comments to name the specific government entity it is referring to, and describe the actions that are specifically cited as an example of a barrier to broadband deployment, as this is the best way to ensure that all affected parties—the relevant governmental entity, citizens and consumer groups, and other private parties that have sought access in the area—are able to respond to specific examples or criticisms. Identifying with specificity particular examples or concerns will ensure that the Commission has a complete understanding of the practices and can obtain additional background if appropriate.[8]

Petitioners' allegations fail to rise to this level of specificity.

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[6] WIA Decl. R. Petition at nn.9–10, 12–13, 17–18, 26, 33, 44, 46, 52, 59, 61.
[7] CTIA Petition at 3, 7–11, 13, 15, 17-19; *id.* At nn.16, 22–24, 29, 39–41.
[8] *In the Matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, Notice of Inquiry, WC Docket No. 11-59 at ¶ 9 (Apr. 7, 2011); *see also Suggested Guidelines for Petitions for Declaratory Ruling under Section 253 of the Communications Act*, 13 FCC Rcd. 22970 (Nov. 17, 1998) (providing guidance to petitioners for declaratory rulings under 47 U.S.C. § 253 to provide specific, factual information). The due process concerns should apply equally here.

Where WIA does provide some level of information on the actions of localities, it often structures its claims as: a locality in "X" state . . .,[9] which puts the onus on all localities within that state to try to reverse engineer whether their interactions with a wireless carrier are being referenced and discussed fairly. Similarly, CTIA structures its accusation as: a "X" state locality . . .,[10] which unfairly shifts the burden to local governments to try and identify the basis for the claims.

Basic due process requires more than this. Due process requires at a minimum notice and an opportunity to be heard.[11] This standard has not been satisfied by the allegations advanced by Petitioners in their filings. By failing to name with specificity the parties against whom they advance their claims, Petitioners have deprived the communities they accuse of fair notice and prevented them from being able to substantively respond. The Commission must accord little or no weight to these baseless assertions.[12]

II. SHOT CLOCK ISSUES

Clear and sensible shot clock rules are important to streamline modification applications consistent with the statute and local resources. Unfortunately, the Petitions' proposed clarifications miss the mark.

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[9] WIA Decl. R. Petition at 10–11, 13.
[10] CTIA Petition at 11,14, 18.
[11] *See, e.g.*, *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950).
[12] *See, e.g.*, Public Notice (inviting interested parties to submit factual data and economic analysis); *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 17-79, 32 FCC Rcd. 3330, 3333, ¶ 7 n.9 (Apr. 21, 2017); *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies*, Public Notice, WT Docket No. 16-421 (Dec. 22, 2016) (stating that the Commission "will accord greater weight to systematic data than merely anecdotal evidence.").

The current 60-day shot clock and submittal rules already accomplish the goals embodied in Section 6409(a). Modifications are already being approved within the current timeframes and WIA's proposal would introduce more subjectivity and ambiguity that will confuse applicants and permit authorities alike. Most importantly, both Petitioners advocate for a remedy so extreme that no public health and safety official would recognize it as sound policy.

The Commission should find that there is no basis in the record to justify these misguided proposals. The proposed shot clock rules would make the process more confusing and threaten local ability to enforce longstanding public health and safety standards.

A. The Petitions Seek to Solve an Unreasonable-Delay Problem that Does Not Appear to Exist

WIA and CTIA attempt to paint state and local governments as obstacles to deployment that game the shot clock in order to frustrate infrastructure investment. This gross misrepresentation and overgeneralization lacks a basis in fact, and data collected by Western Communities Coalition shows that delays in the deployment process are overwhelmingly due to the acts or omissions by applicants.[13]

The most common delays in the process occur either when applicants fail to submit complete permit applications or fail to timely pull their approved permits.

[13] In response to the Public Notice, data was collected from Beaverton, Oregon, Thurston County, Washington, Tumwater, Washington, Cerritos, California, Danville, California, San Marcos, California, San Diego, California, and Pleasanton, California. The information covers all eligible facilities requests processed by the cities since January 1, 2014.

More than 70% of applications require at least two incomplete notices before the applicant provides all the information needed to act on the request, which adds an average of 29 additional calendar days to the process. Approximately 20% of all applications require a third incomplete notice and approximately 5% require a *fourth* incomplete notice, which typically results in, respectively, approximately 31 and 40 additional calendar days to the review process. Given that most cities act within approximately 60 shot-clock days from the initial submittal, applicants could improve their time-to-approval by 50% just by providing a complete application in the first instance.

Likewise, the cities report that applicants take approximately *three* times as long to pick up their approved permits as it takes cities to approve them. In the City of San Diego, which has reviewed more than 650 eligible facilities requests, an approved permit is typically ready for the applicant to pick up for approximately 129 days and, as of this filing, 8% of all permits for eligible facilities requests approved by the City are still waiting to be picked up. One permit sat ready to issue for more than 500 days.

Simply put, the data shows local governments are not responsible for delays in Section 6409(a) collocations and modifications.[14] The Commission should reject any proposed rule changes that are based on the false premise in the Petitions that local governments are the bottleneck in the deployment process.

[14] Although some industry members may rightly point out that delays after an approval can arise from conflicts in scheduling utilities and contractors, this does not explain why those same industry members file petitions with the Commission to preempt local review processes.

B. WIA's Proposed Shot Clock Commencement Rule is Confusing, Inconsistent with the Act and Incentivizes Applicant Misconduct

WIA proposes two new standards by which to judge whether an application has been deemed to commence the shot clock.[15] Both standards needlessly add layers of subjective determinations to the shot clock rules that the record and the statute do not support. Rather than combat alleged refusals to accept applications, WIA's rule would arm applicants with more reasons to subvert reasonable application procedures. Would the Commission seriously consider amending its own rules regarding how one files a petition for declaratory ruling or an application for a license, and accept any filing that was a "good faith attempt" to comply with the Commission's filing requirements? The Commission should reject WIA's ambiguous "clarification" and reiterate its support for local flexibility to establish application procedures.[16]

1. The Commission Should Not Preempt Reasonable Application Intake Procedures to Manage Multiple Eligible Facilities Requests for the Same Tower or Base Station

Wireless communication facilities are iterative projects that change over time. Sites also change property owners, managers and carriers through lease sales and assignments. These dynamics complicate the state and local review process. Local officials often find it impracticable to establish a baseline site condition from

[15] WIA Decl. R. Petition at 8 (requesting that the Commission clarify that a "good faith attempt to seek the necessary government approvals" by "any reasonable process" starts the shot clock).
[16] *See In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, 30 FCC Rcd. 31 at ¶ 221 (Oct. 17, 2014) [hereinafter "*2014 Infrastructure Order*"].

which to review multiple purported eligible facilities requests related to the same site, at the same time, but by different applicants.

For example, how could a local official know that a proposed increase in height by one carrier on a shared monopine would not exceed the cumulative height limit if submitted while another carrier on the same monopine sought a similar modification? Likewise, the inability to establish a baseline condition may result in multiple conflicting approvals.

Accordingly, the Commission should decline to act on any proposal that would require local governments to accept applications by the applicant's method of choice. This approach would be consistent with the Commission's policy choices in the *2014 Infrastructure Order* that stressed cities should have "flexibility . . . to exercise their rights and responsibilities" regarding procedures for review of applications under Section 6409(a).[17]

2. WIA's Proposal to Commence the Shot Clock After a "Good Faith Attempt" Lacks a Basis in the Act, the Record and Common Sense

To support its rule change, the Commission must construe ambiguities in a manner the statute permits.[18] However, neither Section 6409(a), Section 332(c)(7), WIA's unverified allegations, nor the downstream implications of WIA's proposal justify a clarification. The Commission should therefore reject the proposed "good faith attempt" and "any reasonable process" standards.[19]

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[17] *2014 Infrastructure Order* at ¶ 221.
[18] *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984).
[19] Many arguments raised by certain Western Communities Coalition members in the Commission's *Small Cell Order* proceeding are applicable to this issue. *See* In the Matter of Accelerating Wireless

a. *The Proposed "Good Faith Attempt" Standard Conflicts with the Plain Language in Section 332(c)(7)(B)(ii)*

WIA's proposed "good faith attempt" and "any reasonable process" standards conflict with the plain text in the shot clock's underlying statute. Section 332(c)(7)(B)(ii) states in full:

> A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is *duly filed* with such government or instrumentality, taking into account the nature and scope of such request.[20]

The statute requires more than a mere "good faith attempt" to file by "any reasonable process" determined by the applicant. By the ordinary definitions, the phrase "duly filed" literally means to properly initiate a judicial or administrative proceeding by submitting the proper documents or following proper procedure.[21] Any interpretation to mean an event less than *actual submittal* through the *proper local procedures* would directly conflict with the statute.

b. *The Proposed Rule Would Reverse the 2014 Infrastructure Order Based on Vague and Unverified Anecdotes in the Petitions*

Broadband Deployment by Removing Barriers to Infrastructure Investment, Comments of the League of Arizona Cities and Towns *et al.*, WT Docket No. 17-79 at 14–25 (Jun. 15, 2017). Rather than restate them here, the Western Communities Coalition attaches those comments as **Exhibit F** and incorporates them herein by this reference.

[20] 47 U.S.C. § 332(c)(7)(B)(ii) (emphasis added).

[21] *See Duly*, Merriam-Webster, https://www.merriam-webster.com/dictionary/duly ("properly"); *File*, Merriam-Webster, https://www.merriam-webster.com/dictionary/filed (last visited Oct. 10, 2019) ("to submit (a legal document) to the proper office (as the office of a clerk of court) for keeping on file among the records especially as a procedural step in a legal transaction or proceeding").

Despite the Commission's request for factual data, WIA maligns unnamed communities with vague and unverified anecdotes.[22] These "bad actor" stories are legally insufficient evidence upon which to support a rule change that will impact thousands of localities. Rather, WIA's practice of leaving local governments guessing whether a factual basis to its stories exist can only be viewed as an attempt to evade scrutiny. Even if there is any truth to the allegations, which is impossible to determine from the current record, the existing deemed granted remedy is sufficient to combat isolated incidents of a local refusal to process a Section 6409(a) request.

As the Commission properly recognized in the *2014 Infrastructure Order*, "the prospect of a deemed grant will create significant incentives for States and municipalities to act in a timely fashion."[23] WIA's selective storytelling does not indicate whether its members even attempted to leverage a deemed grant, or whether other factors involved in the application absolve the maligned localities. Regrettably, and perhaps by design, WIA provides no opportunity to refute, correct or verify these and similar allegations.

Accordingly, the Commission should afford these allegations no weight and reject WIA's proposed rule change. Considering the factual data and

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[22] *Compare* Public Notice (inviting interested parties to submit factual data and economic analysis), *with* WIA Decl. R. Petition at 8 (providing no support for its claim that (1) some "localities" have no EFR procedures and claim they cannot process such applications until the procedures are established; (2) "jurisdictions claim that additional information not required by local codes must be provided before it will accept an EFR; (3) "some localities simply refuse to acknowledge or accept EFRs and thus claim that the shot clock has not been triggered."; and (4) "some local governments will bounce an EFR between departments or processes and then disregard the shot clock or argue that the shot clock has not started.").

[23] *2014 Infrastructure Order* at ¶ 233.

counterevidence the Western Communities Coalition provides throughout these comments, accepting WIA's position at face value would be arbitrary, capricious and constitute reversible error.

c. *Ambiguities in the Proposed Rule Would Exacerbate Applicant Misconduct*

The records in recent proceedings show that many local public agencies initially adopted submittal procedures for wireless applications in response to misconduct by applicants. For example:

- In Hillsborough, California, Crown Castle "submitted" 13 applications for small cells by leaving them on the counter at town hall one Friday afternoon. Crown Castle later sent a letter to inform the town that the shot clock had commenced.

- In Thousand Oaks, California, Mobilitie submitted plans as the "California Utility Pole Authority" in an apparent attempt to pass itself off as a quasi-governmental agency to claim preemption over local standards and procedures.[24]

- In Clayton, California, Mobilitie inquired about permitting and licensing procedures, subsequently ended contact with city staff, reappeared several months later under the pseudonym "CA Transmission Network, LLC" to inquire with a different city department. As the "CA Transmission Network, LLC", the applicant falsely claimed that the entity was a state regulated public utility. After all this, staff soon discovered that Mobilitie's permit requests were for a location not located within the city's jurisdiction.[25]

- In Concord, California and Richmond, California, ExteNet ignored the published procedures in the municipal code that required applications to be submitted to the planning office for review because it believed that applications should only be processed through ministerial departments.[26]

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[24] *See In the Matter of Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Practices*, WT Docket No. 16-421, Joint Comments of the League of Ariz. Cities and Towns, *et al.* at 12-13 (Mar. 8, 2017) [hereinafter "Joint Comments In re Mobilitie Petition"]. Mobilitie's deceptive practices were not limited to California. *See id.* at 14 (describing similar controversies in Minnesota, Florida, Connecticut and Virginia).

[25] *See id.* at 14.

[26] *See id.* at 19.

- In Greenwood Village, Colorado, Crown Castle complained about alleged delays due to requirements for public notice and public input, claiming that the requirements violated the shot clock. However, Crown Castle neglected to inform the Commission that it was referring to older applications, where they were provided alternative locations for siting in rural residential areas, and were in a community that was addressing upcoming changes in state law that required compliance with a shot clock.[27] After the filing of the Reply Comments noted here, which debunked Crown Castle's allegations, Crown Castle subsequently made the same allegations, falsely accusing Greenwood Village of the same delays, without even acknowledging that its claims had previously been shown to be inaccurate.[28]

- The Commission's own Intergovernmental Advisory Committee noted in its Advisory Recommendation No. 2018-01 that, more often than not, problems with applications moving forward resulted from defective applications filed by the wireless providers or their consultant companies acting on their behalf.[29]

To be sure, the Western Communities Coalition does not mean to paint with too broad a brush because not all applicants conduct themselves in the manner illustrated above. However, the actions described above contributed to the local need to more closely manage the application submittal and review process.[30]

Indeed, local application submittal procedures serve several legitimate interests. For instance, pre-application procedures enable efficient use of limited

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[27] *See id.* at 5–6.

[28] *See In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Reply Comments of the Colorado Communications and Utility Alliance, *et al.* at 3–4 (July 17, 2017).

[29] *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79 and WC Docket No. 17-84, FCC Intergovernmental Advisory Committee, Advisory Recommendation No. 2018-01 at § IV (Mar. 21, 2018).

[30] As noted by certain Western Communities Coalition members in prior Commission proceedings, the increasingly strict regulatory environment also contributes to a perceived need to adopt a defensive strategy. *See In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Joint Comments of the League of Arizona Cities and Towns *et al.* at 1–14 (Jun. 15, 2017) [hereinafter "Joint Comments In re *Small Cell Order*"]. And, as the Commission's regulations provide ever-shorter timelines with increasingly harsh penalties for untimely action by state and local governments, bad experiences in one jurisdiction inform how others should protect themselves against similar gamesmanship.

resources. Applications with defects or with information that demonstrates the proposed changes are substantial and do not qualify for Section 6409(a) approval can be identified earlier, which allows the applicant to reform the application or submit through the proper regulatory framework. In-person submittal requirements temper the ability of applicants to submit applications outside of business days and after business hours when staff is unable to begin reviewing an application or route it to the correct department. Submittal appointments or "open window" hours are common practices to promote reasonable management of application intake and workflow. Submittal requirements and local review practices are not procedural requirements applicable only to the wireless industry – they apply to all development in order to create order and efficiency to the development review process.

Moreover, forcing cities to adopt drastically different procedures for wireless applications than for all other development applications foments internal confusion. Under WIA's proposed rule, it should come as no surprise that local officials will elect to retain *ad hoc* legal or consultant services just to address basic questions about when an application is deemed submitted.

To make matters worse, WIA and CTIA propose new shot clock remedies that parlay confusion about the commencement date into greater risks to public health and safety. "Good faith attempts" to submit an application under "any reasonable process" are facially ambiguous concepts that will inevitably invite disputes. Under the existing regime, the rules correctly err on the side of caution such that a failure

to act does not presumptively authorize unpermitted construction. However, the proposed rule changes increase incentives for applicants to game the shot clock by relying on an uncertain commencement date as cover for unpermitted builds. The Western Communities Coalition expects that the Commission will fully consider the outgrowths these proposed rules would have on public health and safety.

C. Petitioners' Expanded Deemed Granted Remedy is Unlawful, Misguided, Dangerous and Reverses Prior Commission Policy

WIA asks the Commission to authorize construction if a state or local government fails to seek judicial review within 30 days after an applicant sends a deemed granted notice.[31] CTIA suggests that Section 6409(a) authorizes at-risk builds without construction permits.[32] Building permits are public safety oriented. They require inspections to demonstrate compliance with a variety of structural, electrical and other construction concerns. They help ensure that the correct easements for utilities and ingress and egress are utilized, so the construction does not inadvertently end up as a trespass on unauthorized property. Both the WIA and CTIA approaches lack a statutory hook and adopting them would reinforce that the Commission has no authority or expertise in local zoning issues and construction practices. Taken together, this policy reversal would threaten public safety and spur more litigation in states and local governments around the country that will not accept unauthorized construction to proceed unabated.

1. There is No Statutory Basis for any Limitations Period on State or Local Government Responses to Deemed Granted Notices

[31] WIA Decl. R. Petition at 7.
[32] *See* CTIA Petition at 20.

The Act imposes no limitations period on challenges by state or local governments against applicants for wireless facilities authorizations. Statutory silence does not license the Commission to spin extreme remedies from whole cloth. A side-by-side comparison of the relevant statutes illuminates the textual holes in WIA's proposal.

Section 6409(a) contains no limitations period whatsoever, let alone any remedies.[33] In contrast, Section 332(c)(7)(B)(v) creates a 30-day limitations period for "[a]ny person adversely affected by any final action or failure to act by a State or local government."[34] The "person adversely affected" is the applicant, not the state or local government.[35] Even if a state or local government could be "adversely affected" by a deemed granted notice, the adverse effect would flow from action by the applicant rather than "any final action or failure to act by a State or local government."[36] Construed in the Act's entirety, Section 6409(a) provides no limitations period at all and Section 332(c)(7)(B)(v) simply cannot be read as a limitations period on challenges brought by state or local governments against an applicant.

Indeed, local public agencies may have *no interest* in litigating a deemed-granted notice until the applicant makes the dangerous decision to proceed with unauthorized construction. Even then, a local government's grievance arises not

[33] *See* 47 U.S.C. § 1455(a).
[34] 47 U.S.C. § 332(c)(7)(B)(v).
[35] *See id.* This same provision also authorizes "[a]ny person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief." *Id.*
[36] *See id.*

from its own failure to act but in the applicant's unauthorized construction and disregard for public health and safety.

2. The Commission Has No Authority or Expertise in Zoning or Construction Practices

For decades, Congress recognized that the Commission lacks broad authority or expertise in zoning or construction.[37] More recently in the *2014 Infrastructure Order*, the Commission expressly "agree[d] with municipalities that the Commission does not have any particular expertise in resolving local zoning disputes."[38] By expressly discouraging the Commission's role in construction and by the Commission's own admission, adopting a rule that replaces local expertise with a Commission mandate would not be entitled to deference.[39] Moreover, the rule would require a substantial justification that weighs the public harms that flow from hundreds of thousands of modifications to existing wireless facilities that would inevitably occur as 5G networks roll out.

3. Construction Authorized by a Deemed Approval Notice Raises Serious Tenth Amendment Concerns

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[37] *See* 47 U.S.C. § 319(d); *see also United Keetoowah Band of Cherokee Indians in Oklahoma v. FCC*, 933 F.3d 728 (D.C. Cir. 2019) ("The Commission generally does not require construction permits before private parties can build wireless facilities. Congress largely eliminated the FCC's site-specific construction permits in 1982, and the Commission has since required construction permits only where it finds that the public interest would be served by such permitting. *See* Pub. L. 97-259, 96 Stat. 1087, § 119 (1982) (codified at 47 U.S.C. § 319(d)).").

[38] *2014 Infrastructure Order* at ¶ 235.

[39] *See Motor Vehicle Manufacturers Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency . . . offered an explanation for its decision that . . . is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

Under the proposed rule, applicants could commence construction without any express approval from any federal, state or local legislative, judicial or administrative authority. The Commission would effectively approve *sub silentio* applications submitted to state or local governments.

Without a federal order, the approval flows from local rather than federal authority.[40] Moreover, if the Commission assumed responsibility for construction permits, it would amount to a significant reversal in longstanding policies. In the *2014 Infrastructure Order*, the Commission expressly disclaimed its role in dispute resolution over applications deemed granted by its rule.[41] The Commission cannot disregard its own reasons in the *2014 Infrastructure Order* that supported this disclaimer.[42]

4. The Existing Deemed Granted Remedy is Adequate to Provide Relief and Petitioners' Proposal Will Spur Unregulated Construction and More Litigation

Petitioners allege that failing to act on a Section 6409(a) application warrants subverting the obligation to obtain local construction permits but propose different

[40] *See Montgomery Cnty. v. FCC*, 811 F.3d 121, 129 (4th Cir. 2015) (finding that applications filed with local governments but deemed approved and upheld by a declaratory judgment action are authorized by federal rather than local authority).

[41] *2014 Infrastructure Order* at ¶ 20 ("Provide that parties may bring disputes—including disputes related to application denials and deemed grants—in any court of competent jurisdiction. The Commission will not entertain such disputes."); *id.* ¶ 234 (finding "that the most appropriate course for a party aggrieved by operation of Section 6409(a) is to seek relief from a court of competent jurisdiction"); *id.* ¶ 236 ("The enforcement of such claims is a matter appropriately left to such courts of competent jurisdiction.").

[42] *See Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (2016) ("[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."). Ultimately, the Commission still has neither the expertise in this subject matter nor the resources to address the issues that may arise in each local jurisdiction. The proposed deemed granted rule may even suggest that local government officials could be required to travel to or retain local counsel in Washington, DC to contest Commission-authorized construction.

procedures necessary to obtain this extreme remedy.[43] WIA argues that a deemed granted notice should trigger a 30-day limitations period for the locality to challenge the deemed grant in court.[44] CTIA goes even further and argues that a deemed granted notice to the permitting authority, by itself, should lawfully authorize the applicant to modify the facility.[45] Both proposed rules are misguided, but CTIA's proposal is particularly dangerous.

State and local governments require construction permits to verify compliance with minimum standards that mitigate risks of harm to people and property. State and local officials are subject matter experts in ensuring compliance with the applicable standards that exist in their jurisdictions. Building and safety codes are not identical and not all engineers and contractors are as intimately familiar with the local rules as the officials tasked with enforcing them. Petitioners' proposed deemed granted remedy threatens this balance. Removing the role state and local officials play, especially for the mere failure to act within 60 days, is so antithetical to public health and safety that Congress could not have intended Section 6409(a) to be construed this way.

WIA's reasons that "[a]bsent [the 30-day limitations period], expensive and time-consuming litigation may be required—which is inconsistent with the objective of Section 6409(a)."[46] Curiously, CTIA finds that the Commission's ruling in the *Small Cell Order* supports the proposition that the deemed granted remedy should

[43] *See* CTIA Petition at 19; WIA Decl. R. Petition at 7.
[44] *See* WIA Decl. R. Petition at 7.
[45] *See* CTIA Petition at 19.
[46] *See* WIA Decl. R. Petition at 7.

apply to all siting authorizations necessary for the deployment, including construction, traffic control and encroachment permits.[47] Neither rationale carries water.

First, the proposed rule will spur *more* litigation, not less. In the *2014 Infrastructure Order*, the Commission correctly predicted "deemed grants to be the exception rather than the rule."[48] WIA presents no evidence that the current rule results in significant litigation. Under WIA's proposed rule, in situations where a genuine dispute arises, state and local governments will have a strategic incentive to reflexively deny applications to avoid the need to bring a lawsuit.[49] Alternatively, rather than letting unpermitted construction proceed unabated, applicants should expect state and local officials to enforce their codes, which may provide for summary removal of unpermitted obstructions in the public rights-of-way.[50] How WIA interprets these outcomes as likely to reduce litigation is a mystery.

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[47] *See* CTIA Petition at 19 (citing *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, 33 FCC Rcd. 9088 at ¶ 144 (Sep. 27, 2018) [hereinafter "*Small Cell Order*"], and contending that if the Section 332 shot clocks and their attendant injunctive remedies apply to all siting necessary siting authorizations, so too should the Section 6409 shot clock and the deemed granted remedy).

[48] *2014 Infrastructure Order* at ¶ 233.

[49] *See id.* at ¶ 236.

[50] *See, e.g.*, SAN DIEGO, CAL. MUN. CODE § 121.0310; CARLSBAD, CAL., CODE § 6.16.150 (stating that the city manager may summarily abate a public nuisance without a public hearing to preserve or protect the public health and safety and charge the responsible party the full cost of the investigation and abatement of the nuisance); See ENCINITAS, CAL., CODE § 1.08.070(D) (stating a code enforcement officer may abate a nuisance without prior notice); See RICHMOND, CAL., CODE § 9.50.150 (noting that the Director of Public Works may summarily abate without notice or a hearing if the condition of the premises is immediately dangerous to the public health, safety or welfare that would subject the public to potential harm of a serious nature and the City may charge the responsible party the full cost of the abatement). .

Second, CTIA's position is an apples-to-oranges comparison considering the harms that flow from unregulated construction and undermines the rationale for its proposed remedy. Nowhere does the *Small Cell Order* suggest that the legal and equitable remedies for a failure to act would remove state and local roles in reviewing applications for compliance with building and safety codes. Rather, to the extent a court issued an injunction to approve a facility for a failure to act under the *Small Cell Order*, the permitting agency would be entitled to a reasonable amount of time to issue required construction permits. Under CTIA's "Wild West" approach, applicants would self-police and coordinate their own activities, shut down traffic lanes as they please, clean up construction materials in the streets and on public and private property if they felt like it, construct facilities that may not meet structural support standards, the National Electric Safety Code requirements, wind and ice load standards and otherwise pose hazards to public safety.[51]

D. Section 6409(a) Contains No Requirement for a Written Decision and Any Requirement Invented by the Commission Should Be No Broader than as Required under Section 332(c)(7)(B)(iii)

[51] In Baltimore, Maryland, Mobilitie erected a new utility pole atop a large concrete base without permits that directly obstructed access to an ADA sidewalk ramp. *See* Joint Comments In re Mobilitie Petition, supra note 12 at 20. This was not an isolated incident. Mobilitie was later fined $1.6 million by the Commission for repeatedly violating local siting practices and federal environmental and historic preservation review procedures. *See In the Matter of Mobilitie, LLC*, Order and Consent Decree, File No. EB-SED-17-00024244 (Apr. 10, 2018). In Vallejo, California, Verizon constructed an unpermitted small cell on a utility pole and after staff discovered the issue, Verizon subsequently threatened legal action if the city did not issue the permit within a week. *See* Joint Comments In re Mobilitie Petition, supra note 12 at 21.

WIA requests that the Commission invent a new three part written decision requirement that has no basis in the Spectrum Act.[52] Section 6409(a) does not require any written decision—much less any written reasons—to deny an eligible facilities request.[53] Congress' decision not to impose special written decision requirements for eligible facilities requests is clear from the text and structure in the Spectrum Act.

First, Congress directed the Commission to "implement and enforce [Section 6409(a)] as if [Section 6409(a)] is a part of the Communications Act of 1934 . . . ."[54] Section 332(c)(7)(B)(iii) was added to the Communications Act by the Telecommunications Act.[55] Section 6409(a) must be construed within this entire statutory framework.[56] Congress' silence does not automatically create gaps for the Commission to fill.[57]

Second, the detailed requirements for written denials in Section 6409(b), which concerns requests to use federal lands for communication facilities, amplifies the silence in Section 6409(a). Congress clearly knows how to impose a writing

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[52] *See* WIA Decl. R. Petition at 7 (asking the Commission to clarify that a denial "must (i) be in writing, (ii) clearly and specifically make an express determination that the request is not covered by Section 6409(a), and (iii) include a clear explanation of the reason(s) for the denial to be effective.").
[53] 47 U.S.C. § 1455(a).
[54] 47 U.S.C. § 1403(a).
[55] Telecommunications Act, Pub. L. 104-104, 110 Stat. 56 § 704 (Feb. 8, 1996).
[56] *See, e.g.*, *FCC v. AT&T Inc.*, 562 U.S. 397, 407–08 (2011) (considering meaning of "personal privacy" in light of its use in a distinct but similar exemption within the same statute); *Holder v. Hall*, 512 U.S. 874, 883 (1994) (comparing the functioning of two sections within the Voting Rights Act of 1965 that "differ in structure, purpose, and application").
[57] *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1255–70 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994) (reviewing "post-enactment aids to interpretation," including legislative silence).

requirement when it wants one.[58] In the same statute, adopted at the same time, Congress found it necessary to expressly require executive agencies to provide a written notice that "includ[es] a clear statement of the reasons for the denial."[59]

Even if the Commission could interpret Section 6409(a) to require a written decision, which it cannot, the Commission could not exceed the statutory grant in Section 332.

Section 332(c)(7)(B)(iii) requires that:

> Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.[60]

In *T-Mobile South, LLC v. City of Roswell*, 574 U.S. 293 (2015), the U.S. Supreme Court held that:

> the statutory text and structure, and the concepts that Congress imported into the statutory framework, all point clearly toward the conclusion that localities must provide reasons when they deny cell phone tower siting applications. We stress, however, that these reasons need not be elaborate or even sophisticated, but rather, as discussed below, simply clear enough to enable judicial review.[61]

This interpretation leaves no gap for the Commission to fill. As the Supreme Court explained, the phrase "substantial evidence" refers to a term of art to describe

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[58] *Cf. T-Mobile South, LLC v. City of Roswell*, 135 S.Ct. 808, 820–21 (2015) (ROBERTS, C.J., dissenting) (collecting writing-requirement examples from the Act)
[59] 47 U.S.C. §§ 1455(b)(3)(A)–(B).
[60] 47 U.S.C. § 332(c)(7)(B)(iii).
[61] *City of Roswell*, 135 S.Ct. at 815.

how courts review administrative decisions, and "[t]here is no reason discernible from the text of the Act to think that Congress meant to use the phrase in a different way."[62]

Despite lacking a basis in Section 6409(a), Section 332(c)(7) or *Roswell*, WIA proposes that local agencies that fail to provide "clear explanations" and "clear and specific" express determinations cause the shot clock to continue running. Contrary to WIA's assertion, the proposed rules would cause *more* confusion as to whether the shot clock expired. Under the current regime, at the time the local agency denies a covered request within 60 days, the shot clock definitively ends and the limitations period for the applicant's right to challenge the denial begins.[63] The applicant has an unambiguous and immediate remedy.

Under WIA's suggested morass, the applicant could assert that the local decision lacked sufficient clarity and the shot clock continues to run. One might expect the local government to reject the applicant's claim, asserting that it issued a proper determination. At this point, a dispute materializes over the clarity of the decision with the applicant deeming the project granted and the local government claiming otherwise. Or the applicant might *not* intentionally initially assert that the decision lacked sufficient clarity, wait for the expiration of 60 days, and then claim

[62] *Id.* Although three justices dissented from the majority opinion, a principal concern among them was that the majority's decision incorrectly presumed that wireless carriers needed protection from local zoning officials. *Id.* at 822–23 ("the local zoning board or town council is not the Star Chamber, and a telecommunications company is no babe in the legal woods.")
[63] *See* 47 U.S.C. § 332(c)(7)(B)(v); *see also 2014 Infrastructure Order* at ¶ 236.

a shot clock violation. How these scenarios avoid confusion and establish a clear end date for the 60-day period is a mystery.

Complex rules for eligible facilities requests would only confuse the review process. The Commission acknowledged that whether the request is covered must be determined "on a non-discretionary and objective basis".[64] Under these conditions, determinations of a covered request are apparent on their face. If for some reason they are not, the *2014 Infrastructure Order* established a closed universe of non-discretionary and objective factors for the reviewing court to evaluate denials. Whether an application qualifies as an eligible facilities request that causes a substantial change are questions of law over which courts do not owe deference to the local decision. The same cannot be said for traditional zoning decisions that may involve subjective decisions governed under the substantial evidence standard that justify a writing requirement to enable judicial review.[65]

Additionally, a negative determination does not mean the project will be denied; rather, it only means that the project is not an eligible facilities request subject to mandatory approval as a matter of law. Non-covered requests are still routinely approved under the subjective factors embodied in local codes that Congress preserved under Section 332(c)(7).

E. The Commission Should Not Preempt Public Notice and Hearing Requirements

[64] *See 2014 Infrastructure Order* at ¶ 232.
[65] *See City of Roswell*, 135 S.Ct. 808 at 815.

Neither Section 6409(a) nor the *2014 Infrastructure Order* mandate a particular process by which state or local governments must review applications tendered as eligible facilities requests.[66] Nevertheless, the Petitioners ask the Commission to preempt public hearings some state and local public agencies use to review and evaluate these applications.[67] The Commission declined to grant similar requests in the *2014 Infrastructure Order* and should do so again.[68]

1. Public Hearings Serve a Legitimate Function Reasonably Related to Whether a Proposed Modification Qualifies as an Eligible Facilities Request

All humans, including applicants and local officials, are fallible. Even under objective review criteria, errors in math and perception can occur, which may result in decisions that erroneously approved or denied eligible facilities requests. The public hearing process affords an equal opportunity to hash out the facts and ensure that the local public agency reaches the correct result.

Whether to grant an alleged eligible facilities request is not always as cut-and-dried as the Petitions assume. For example:

- ***Concealment:*** A collocation or modification causes a substantial change when it would "defeat the concealment elements of the support structure."[69] As discussed in Part III, *infra*, this analysis requires the local public agency to carefully consider not only the concealment elements that may be impacted by the proposed modification, but also potentially how the

[66] *See* 47 U.S.C. § 1455(a); *2014 Infrastructure Order* at ¶¶ 220–21.
[67] WIA Decl. R. Petition at 9.
[68] *See 2014 Infrastructure Order* at ¶ 221.
[69] *See* 47 C.F.R. § 1.6100(b)(7)(v).

modification affects the site in context with its surroundings. Persons most directly impacted by a potential change in concealment are best positioned to weigh in on whether such a change is consistent with (*i.e.*, does not defeat) the existing concealment.

A public hearing (or the option to hold one on appeal) may also be an efficient forum to consider alternative concealment when the proposed equipment cannot be concealed in the same manner as the existing equipment, which frequently occurs when an applicant proposes upgrades to "slimline" monopoles or mono-flagpoles.[70] The photo simulation in **Figure 1**, below, shows an existing Sprint site on a flagpole proposed to be significantly expanded with alternative concealment.

[70] *See generally Board of County Commissioners for Douglas County v. Crown Castle USA, Inc.*, Case No. 17-cv-03171-DDD-NRN, ___ F. Supp. 3d ___, 2019 WL 4257109 (D. Colo. Sep. 9, 2019).

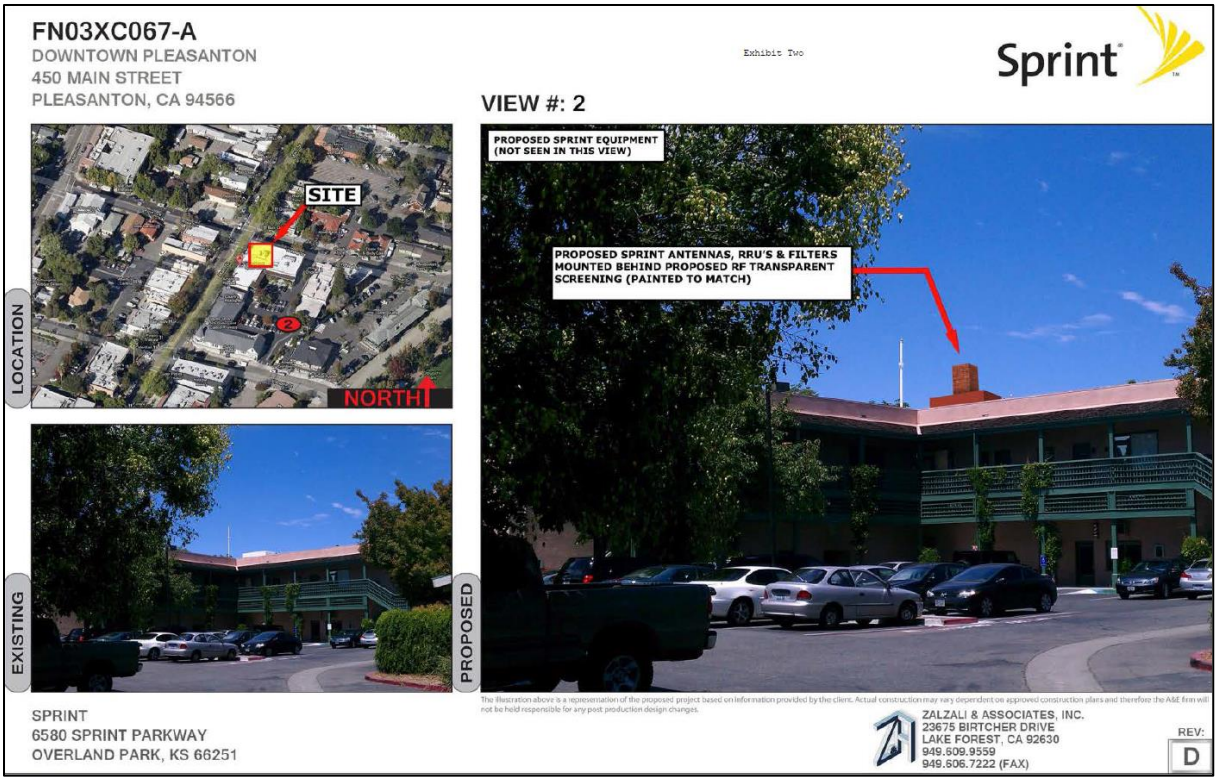

Figure 1

The proposed modification, while technically concealed, fundamentally alters the existing concealment associated with the mono flagpole on the rooftop. This structure is also within a historic district and the proposed faux chimney conflicts with the overall aesthetic. Although it would be physically impossible to maintain the same concealment given the significantly expanded equipment proposed, the city worked with the applicant to identify alternative concealment with a different size, scale and finish that comported with the historic design features (see **Figure 2**). The applicant also worked with the city to place the new structure in a location where it could not be seen from street level along Main Street (see **Figure 3**).

Figure 2

Figure 3

- ***Cumulative Height Limit:*** The height limit is a *cumulative* limit.[71] For towers, the cumulative limit is measured from the overall height that existed on the date Congress enacted Section 6409(a) (*i.e.*, February 22, 2012) because the equipment will be vertically separated.[72] For almost all base stations, the cumulative limit is measured from the original structure height because the equipment will be horizontally separated.[73] This threshold presents an opportunity for inadvertent error as the overall height that existed on the date Congress enacted Section 6409(a) may be difficult to discern. Especially when the structure involves a legacy monopole subject to multiple modifications over several decades, a public hearing (or the option to hold on appeal) may be an efficient way to produce the best evidence as to the overall height at a specific point in time.
- ***Site Expansions within the Public Rights-of-Way:*** A collocation or modification causes a substantial change to a base station when it involves excavation or deployments outside the "site" or "area in proximity to the structure and to other transmission equipment already deployed on the ground."[74] The FCC defines "site" as the leased or owned areas and associated easements for access and utilities, but does not define "proximity" for this purpose.[75] Ground-mounted equipment, particularly in downtown

[71] *See* 47 C.F.R. § 1.6100 (b)(7)(i)(A); *see also Infrastructure Order* at ¶ 196.
[72] *See* 47 C.F.R. § 1.6100 (b)(7)(i)(A); *see also Infrastructure Order* at ¶ 197.
[73] *See* 47 C.F.R. § 1.6100 (b)(7)(i)(A); *see also Infrastructure Order* at ¶ 197.
[74] *See* 47 C.F.R. § 1.6100 (b)(7)(iv), (b)(6); *see also Infrastructure Order* at ¶ 198–99.
[75] *See* 47 C.F.R. § 1.6100 (b)(6).

areas, can interfere with other uses that may also be in "proximity to the structure and to other transmission equipment already deployed on the ground". For example, new cabinets can encroach upon door swings, block window displays or impede foot traffic for local vendors. A public hearing (or the option to hold one on appeal) may be the most efficient way to determine how to navigate this shared space.

Public hearings provide the local governments with the opportunity to perform their work in an open setting and with the best information available from all interested parties. The Commission should not prohibit state and local governments that wish to use this procedure to determine whether an application tendered as an eligible facilities request should be granted.

2. Public Hearings Do Not Harm Applicants or Hinder Deployment

Neither Petition offers any concrete injury from the mere fact that a local public agency decided to hold a public hearing. WIA complains that these hearings result in needless delay[76] but, at bottom, the applicant suffers no harm by a process that either results in a valid approval or denial.

If the application is not covered by Section 6409(a), then the additional process does not violate the basic requirement in the shot clock to act within a reasonable time. Indeed, if the application presented a close question, the additional process would be reasonable "taking into account the nature and scope of such request."[77] If the application is covered by Section 6409(a), then the additional

[76] *See* WIA Decl. R. Petition at 8–9.
[77] *See* 47 U.S.C. § 332(c)(7)(B)(ii).

process will almost always take less time than the average delay between the time a city has permits ready to issue and the time such permits are pulled by the applicant.[78] In any event, any additional time for a public hearing does not contribute to unreasonable delay.

Moreover, all interested parties—including the applicant—are better served by additional administrative process as a prophylactic against unnecessary judicial review. Without the option to appeal an administrative denial, the applicant can usually seek only judicial remedies.[79] Likewise, in a judicial challenge to an approval not subject to any administrative appeal, any competent plaintiff's counsel would seek a temporary injunction against the deployment.[80] In either case, the unavailable administrative appeal would not only delay the deployment but result in the very litigation the Commission seeks to avoid.

The public hearing process, whether available in the first instance or on administrative appeal, mitigates the likelihood that the local public agency would mistakenly approve or deny an eligible facilities request. Accordingly, the Commission should reject proposals by the industry to curtail such processes, especially when these hearings can be conducted within the shot clock timeframe.

III. SUBSTANTIAL CHANGE ISSUES

A. The Commission Should Not Adopt Petitioners' Significant Rewrite of the Concealment Requirements of the Rule

[78] *See* Part II.A, *supra*.
[79] *See* 47 U.S.C. § 332(c)(7)(B)(v) (authorizing judicial remedies except in limited circumstances).
[80] FED. R. CIV. P. 65(b).

Despite Petitioners arguments to the contrary, "concealment elements" refers to the particularized steps the parties take to mitigate the aesthetic harms of a facility, not a facility's overall appearance. The Petitioners' arguments attempt to expand the scope of eligible facilities requests by narrowing the definition of concealment elements. However, changes in size and scale can defeat concealment elements by undermining the concealment of the structure. The significant changes to the rule advanced by Petitioners if implemented by the Commission would unfairly impact localities and threaten to hinder, not advance deployment.

1. "Concealment Elements" Refer to Particularized Steps to Mitigate Aesthetic Harms, Not a Facility's Overall Appearance

In a recent case, a federal district court turned to the dictionary definitions for each word in the phrase and held that:

> "concealment elements" as used in [47 C.F.R. § 1.6100(b)(7)] include those specific, objective conditions or requirements placed on a facility in order to help it blend in with surroundings or otherwise appear to be something other than a wireless transmission facility.
>
> . . .
>
> "Concealment elements" then does not include the overall appearance of the structure, or what it is meant to "look like," but only the particularized conditions or steps that were imposed in order to attempt to achieve "concealment." This definition is not only consistent with the plain meaning of the text but also the regulatory structure and the FCC's justification for the [*2014 Infrastructure Order*].[81]

[81] *Bd. of Cty. Comm'ns for Douglas Cty., Colo. v. Crown Castle USA, Inc.*, Case No. 17-cv-03171-DDD-NRN, ___ F. Supp. 3d ___, 2019 WL 4257109, *8–9 (D. Colo. Sep. 9, 2019).

In fact, though CTIA accuses Douglas County[82] of failing to act on an EFR because of concerns about the expansion of the shroud, CTIA fails to mention that opinions from both a federal magistrate judge and an Article III judge have upheld Douglas County's denial.[83]

This interpretation finds support in both the dictionary and in the *2014 Infrastructure Order*. Concealment refers to "[t]he action of hiding something *or* preventing it from being known."[84] "Element" means "a part or aspect of something abstract, especially one that is essential or characteristic."[85] Taken together, and contrary to Petitioners' proposed interpretation, whether a modification defeats the concealment elements must properly address individual aspects of concealment in addition to the concealment context as a whole. For example, no reasonable person would suggest that installing new equipment painted or finished a different color from all the existing equipment of a uniform color would defeat concealment. Even if the all the equipment was exposed to public view, that the facility was previously painted consistently evidences local intent to conceal the facility to some degree.

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[82] CTIA at 11 n.24. CTIA describes "a Colorado locality" citing an *ex parte* letter from Crown Castle containing identical allegations against Douglas County. From this we infer the "Colorado" locality CTIA means is Douglas County. We are particularly concerned with this tactic given that Douglas County has already submitted documentation in WT Docket No. 17-79 demonstrating the falsity of these allegations. Letter from Douglas J. DeBord, County Manager, Douglas County, Colorado, to Marlene H. Dortch, Secretary, FCC (Aug. 21, 2018) (attached as **Exhibit O**). CTIA's filing did not acknowledge this factual refutation or the associated court orders.

[83] *Bd. of Cty. Comm'ns for Douglas Cty. v. Crown Castle USA, Inc.*, Case No. 17-cv-03171-DDD-NRN, ___ F. Supp. 3d ___, 2019 WL 4257109, (D. Colo. Sep. 9, 2019); *Bd. of Cty. Comm'ns for Douglas Cty., Colo. v. Crown Castle USA, Inc.*, No. 17-CV-03171-RM-NRN, 2019 WL 1044572, at *1 (D. Colo. Mar. 4, 2019).

[84] *Concealment*, LEXICO BY OXFORD (last visited Oct. 18, 2019), https://www.lexico.com/en/definition/concealment (emphasis added).

[85] *Element*, LEXICO BY OXFORD (last visited Oct. 18, 2019), https://www.lexico.com/en/definition/element.

Not all circumstances warrant "invisible" or "stealth" infrastructure and communities must be able to reasonably decide for themselves the level of concealment appropriate for initial deployment that carries over to future modifications. Counter interpretations offered by the Petitioners unduly limit the scope of the rule adopted in the *2014 Infrastructure Order* and subsequent judicial application of that rule.

2. Section 6409(a) Does Not Cover Collocations or Modifications that Defeat Existing Concealment Elements

The Commission's regulations provide that "[a] modification substantially changes the physical dimensions of an eligible support structure if it meets *any* of the following criteria . . . ."[86] Among the "criteria" for a substantial change is a modification that:

> (v) . . . would defeat the concealment elements of the eligible support structure; *or*
>
> (vi) . . . does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment, provided however that this limitation does not apply to any modification that is non-compliant only in a manner that would not exceed the thresholds identified in § 1.[6100](b)(7)(i) through (iv).[87]

This disjunctive rule clearly sets out independent and separate criteria for a substantial change. Failure to comply with all criteria is fatal. As the recent federal case discussed above discussed, the rule's plain language recognizes that an eligible

[86] 47 C.F.R. § 1.6100(b)(7) (emphasis added).
[87] *Id.* §§ 1.6100(b)(7)(v)–(vi) (emphasis added).

facilities request must comply with both the size requirements and the requirement not to defeat the concealment elements.[88]

3. Changes in Size and Scale Can Defeat Concealment Elements

Arguments in the Petitions that maintaining the *status quo* would render Section 6409(a) a dead letter are demonstrably false.[89] Not all wireless facilities are concealed and the limitation on modifications that "defeat the existing concealment elements" would therefore have no impact on these facilities whatsoever.[90]

Even among concealed facilities, not all concealment elements depend on size or scale and so the ability to define concealment in those terms would likewise not impact those facilities. Only a specific subset of facilities falls within the ambit of these requirements. The only facilities affected by the rule would be in a narrow class where concealment depends on contextual factors.

Further, as the *2014 Infrastructure Order* acknowledges, the Commission included physical dimensions as part of the criteria that could undermine a concealment element. Specifically the Commission said that it expects that "failures to meet these criteria will generally relate to changes in physical dimensions, and taking into account the support in the record for including these criteria, we find it appropriate to include them as criteria of the substantial change test."[91] Because to

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[88] *Bd. of Cty. Comm'ns for Douglas Cty., Colo. v. Crown Castle USA, Inc.*, Case No. 17-cv-03171-DDD-NRN, ___ F. Supp. 3d ___, 2019 WL 4257109, *10 (D. Colo. Sep. 9, 2019) ("As explained above, the Rule's plain language requires compliance with both provisions.").
[89] WIA Decl. R. Petition at 10–13; CTIA Petition at 9–13.
[90] *Bd. of Cty. Comm'ns for Douglas Cty., Colo. v. Crown Castle USA, Inc.*, Case No. 17-cv-03171-DDD-NRN, ___ F. Supp. 3d ___, 2019 WL 4257109, *10 (D. Colo. Sep. 9, 2019).
[91] *2014 Infrastructure Order* at ¶ 213 n.543.

do so would be counter to congressional intent, the proposed change to narrow the application of the rule should be rejected.[92]

4. Petitioners Urge the Commission to Adopt an Unduly Narrow Interpretation of the Rule Which Would Unfairly Impact Localities and Threaten to Hinder Deployment

Petitioners request that the Commission narrowly reinterpret the rule such that the definition of "concealment elements are limited to equipment and materials used specifically to conceal the visual impact of a wireless facility pursuant to concealment conditions imposed during the initial siting process."[93] Petitioners further request that size requirements may not be considered concealment requirements, and that permit or general requirements are generally not concealment requirements.[94]

These limited interpretations would unduly limit the scope of the rule adopted in the *2014 Infrastructure Order*, which does not support the restrictive conception of concealment advanced by Petitioners. Specifically, "a modification that undermines the concealment elements of a stealth wireless facility, such as painting to match the supporting façade or artificial tree branches, should be considered substantial under Section 6409(a)."[95] Petitioners now argue that by including examples in a subordinate clause the Commission limited the scope of the rule to only those modifications.

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[92] *Id.*
[93] WIA Decl. R. Petition at 12; *see also* CTIA Petition at 12.
[94] *See* WIA Decl. R. Petition at 12-13; CTIA at 12.
[95] *2014 Infrastructure Order* at ¶ 200.

The rule adopted by the Commission is that a substantial change occurs where a modification undermines the concealment of concealed *or* stealth-designed facilities. The Commission expressly recognized a distinction between concealed facilities and stealth facilities. The latter category consists of "facilities designed to look like some other feature other than a wireless tower or base station", whereas the former category is broader and involves concealment elements as basic as, but not limited to, uniform paint choices.[96] A surface-level reading of the relevant paragraph makes this distinction clear: painting equipment to match the support structure, which the Commission expressly recognizes is a concealment element,[97] does not make the equipment look like something other than wireless equipment. Rather, uniform paint incrementally reduces the visibility of equipment at first glance and/or blends the equipment against its background. Because paint does not make the facility "look like some other feature other than a wireless tower or base station", paint is commonly required to create a "concealed" facility but does not necessarily bear on whether the facility is "stealth." The Commission correctly determined in 2014 that concealment elements are broad enough to incorporate more than faux trees, faux structural features and other creative design techniques that truly hide equipment from view of the casual observer.

[96] *2014 Infrastructure Order* at ¶ 200.
[97] *See 2014 Infrastructure Order* at ¶ 200 n.543 ("For example, a replacement of exactly the same dimensions could still violate concealment elements if it does not have the same camouflaging paint as the replaced facility."). Nowhere does the Commission suggest that painting equipment is always used or intended to make the facility look like something other than a wireless tower or base station.

Furthermore, as the Commission describes, this interpretation is consistent with congressional intent to allow localities to continue to require compliance with concealment requirements.[98] The narrow interpretation now advanced by Petitioners is not supported by the *2014 Infrastructure Order* and runs counter to congressional intent and the Commission's goal of advancing deployment in a manner that respects State and local interests.

a. *Retroactive Limitations on Concealment Unjustifiably Punish Careful Efforts to Conceal New Facilities Taken by Communities in Reliance on the Commission's Existing Rules*

The *2014 Infrastructure Order* preserved local authority to continue to regulate aesthetics of deployments.[99] In reliance on these rules, local governments have reviewed and permitted new concealed facilities in their communities, concomitant with their obligation to protect the aesthetic value of their communities. As the deployment of new facilities has shifted to the right-of-way, localities have grappled with integrating these facilities into the character of their communities. In recognition of the fundamental role that rights-of-way play in a community as "the visual fabric from which neighborhoods are made,"[100] local governments have exercised their traditional police powers to fulfill their obligation

[98] *Id.* ("Further, we find that, as with building codes, Congress did not intend to exempt covered modifications from compliance with such elements and conditions or to undermine such conditions, whether or not they affect the physical dimensions of the wireless tower or base station, and that Section 6409(a) in any case permits States and localities to condition a covered request on compliance with such criteria or otherwise require a covered request to meet these criteria.").
[99] *See id.* at ¶ 200 ("This approach, we find, properly preserves municipal authority to determine which structures are appropriate for wireless use and under what conditions, and reflects one of the three key priorities identified by the [Intergovernmental Advisory Committee] in assessing substantial change.").
[100] *Sprint PCS Assets, LLC v. City of Palos Verdes Estates*, 583 F.3d 716, 724 (9th Cir. 2009).

to protect the aesthetics of their communities. The Commission previously recognized the potential for deployment in the rights-of-way to have to significant and different impact from standalone facilities on private property.[101]

As a federal court recently pointed out when considering the application of these rules, there was no reason for parties to label any particular element of a facility as a concealment element prior to the passage of the Spectrum Act and adoption of the rules, and even now there remains no specific requirement to do so.[102] For the Commission to now impose a rule premised upon such non-existent designations would unfairly and retroactively punish both communities and providers who had no notice, and therefore no reason to expect that regulation would be premised upon such a requirement. This is problematic from both an implementation perspective and as a matter of law.[103]

As far as the retroactivity of the rules, the Supreme Court has already explained that: "A rule that has unreasonable secondary retroactivity—for example, altering future regulation in a manner that makes worthless substantial past

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[101] *2014 Infrastructure Order* at ¶ 195 ("To ensure consistent treatment of structures in the public rights-of-way, and because of the heightened potential for impact from extensions in such locations, we provide that structures qualifying as towers that are deployed in public rights-of-way will be subject to the same height and width criteria as non-tower structures.").

[102] *Bd. of Cty. Comm'ns for Douglas Cty., Colo. v. Crown Castle USA, Inc.*, No. 17-CV-03171-DDD-NRN, 2019 WL 4257109, at *10 (D. Colo. Sept. 9, 2019).

[103] As far as implementation, how would the Commission anticipate that parties should treat facilities that were permitted and constructed prior to any imposed requirement to designate elements as concealment versus non-concealment for the purpose of an eligible facility request? At minimum, parties should be given a reasonable opportunity to prospectively evaluate currently permitted facilities and designate which elements are concealment elements. Though this would impose a substantial burden on localities with limited resources, it would nevertheless be preferable and more equitable than refusing to recognize the concealment elements of facilities unless they have been previously designated as such.

investment incurred in reliance upon the prior rule—may for that reason be 'arbitrary' or 'capricious,' . . . and thus invalid."[104] At minimum, where the secondary retroactivity effects of proposed rules will upset settled expectations and preexisting interests, the Commission is obligated to address these harms.[105]

The proposals advanced by Petitioners would punish the investment localities have made in reliance on the current rules and raises concerns about the retroactivity of the proposals.

b. *Proposed Requirements Threaten to Impede Future Deployments*

Furthermore, the proposed changes advanced by Petitioners threaten to impede, not advance future deployments by incenting State and local denials. As discussed above, local communities have both the opportunity and the obligation to regulate to protect the aesthetic interests of their community, a legal right recognized by the Telecommunications Act.[106]

Under the current rules, a locality may permit a camouflaged site or deny a facility based upon the particularized concerns on the facility's aesthetic impact on, for example, a historic district or a scenic ridgeline. That locality can conditionally grant the deployment with appropriate camouflage requirements secure in the knowledge that over time the facility will remain generally consistent with the original aesthetic conditions.

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[104] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988) (SCALIA, J., concurring) (internal citation omitted).
[105] *NCTA v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009).
[106] *See* 47 U.S.C. § 332(c)(7)(A) (preserving local zoning authority subject to limited enumerated exceptions).

Under Petitioners' proposed rules proposed, the locality's options will be materially altered. Now it must decide whether to approve the facility with the cold comfort that the concealment elements agreed to at the time of the deployment may be later disregarded or deny the application. As noted in *ex parte* meetings at the Commission on July 17, 2014,[107] many creative camouflaged sites in difficult to site areas would never have been approved if the local government knew that regardless of its efforts to conceal the wireless facilities, a subsequent request that would make the equipment more visible would be required to be approved under federal law. Given this uncertainty, the locality may rationally decide to deny the original facility. Thus, the proposed rule change undermines the advantages of collocation recognized by the Commission if local governments become reluctant to permit facilities in the first instance out of the reasonable concern that the applicant would later seek federally-mandated modifications that bear little resemblance to the original conditions.[108] Rational local reluctance in the face of overbearing federal regulations could slow initial deployments, resulting in more siting litigation rather than timely approvals through the standard local procedures. Given the Commission's interest in accelerating the deployment of next-generation wireless facilities,[109] these proposals should not be adopted because of their potential to impede rather than ameliorate siting and deployment.

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[107] Letter from Kenneth S. Fellman, Partner, Kissinger & Fellman PC, to Marlene H. Dortch, Secretary, FCC (Jul. 17, 2014) (attached as **Exhibit M**).
[108] *See, e.g., 2014 Infrastructure Order* at ¶ 142 ("As the Commission noted in the Infrastructure NPRM, collocation on existing structures is often the most efficient and economical solution for mobile wireless service providers that need new cell sites to expand their existing coverage area, increase their capacity, or deploy new advanced services.").
[109] *See, e.g., Small Cell Order* at ¶ 1.

B. The Commission Already Adopted Reasonable Limitations on Equipment Cabinets and Properly Recognized a Distinction Between Ground-Mounted Cabinets and Structure-Mounted Cabinets

CTIA petitions the Commission to "clarify" that the term "equipment cabinet" be limited to those that are "placed on the ground or elsewhere on the premises, and does not include equipment attached to the structure itself, which is covered by other parts of the rule."[110] Without any targeted reason that local governments' determination of equipment cabinets "cannot be correct",[111] CTIA suggests that the Commission ignore its own tested rules regarding the number of equipment cabinets.[112] Rather, CTIA asks the Commission to entirely gut the current and clear number of cabinets that do not trigger a substantial change in Section 1.6100(b)(7)(iii), and replace it with an entirely new and untested meaning that there be no limitation to the number of cabinets affixed to a tower or base station.[113]

This proposal defies the commonly understood definition for an "equipment cabinet". Virtually all terrestrial communication networks require equipment placed in the field. In a wireline network, a "telecom cabinet" generally referred to a Service Area Interface (or "SAI") between the local loop and nearest central office in the public switched telephone network. Carriers placed the SAI typically in the

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[110] CTIA Petition at ii.
[111] CTIA Petition at 14.
[112] *See* 47 C.F.R. § 1.6100(b)(7)(iii) ("For any eligible support structure, it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets; or, for towers in the public rights-of-way and base stations, it involves installation of any new equipment cabinets on the ground if there are no pre-existing ground cabinets associated with the structure, or else involves installation of ground cabinets that are more than 10% larger in height or overall volume than any other ground cabinets associated with the structure . . . .").
[113] CTIA Petition at 14.

public rights-of-way and it usually contained twisted copper pairs. Rack cabinets housed similar telecom equipment placed indoors. Wireless networks also include "base station cabinets" which typically looked like the wireline SAI cabinets but contained transmitters, receivers, power supplies and control equipment rather than twisted pairs. Also, like SAI cabinets, base station cabinets connected the communications signals from users to the mobile switch. Outdoor cabinets consist of a weatherproofed outer shell and internal electrical components.[114]

Newton's Telecom Dictionary defines a "cabinet" as:

> 1. A container that may enclose connection devices, terminations, apparatus, wiring, and equipment. 2. In telecommunications, an enclosure used for terminating telecommunications cables, wiring, and connection devices that has a hinged cover, usually flush mounted in the wall.[115]

Although the second part indicates that Newton envisioned a case specifically for wireline telephone connections, the first part provides a useful generalization from which to begin. At the most basic level, an "equipment cabinet" means a "container" for transmission equipment. It has nothing to do with *where* it is placed.

CTIA's proposal also defies common sense. There would be no basic limit on cabinets that could cause a substantial change, especially in the context of the public right-of-way with greater space limitations and likelihood that new, larger cabinets will substantially change the original approved facility. CTIA's proposal

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[114] *See* Telecordia Technologies, Inc. *GR-487: Generic Requirements for Electronic Equipment Cabinets*, Issue No. 4 (Feb. 2013).
[115] HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 242 (27th ed. 2013).

would allow an unlimited number of cabinets of unlimited sizes and volumes to evade a substantial change.

CTIA's proposal that the height and width substantial change limits are sufficient to address structure-mounted cabinets is misplaced.[116] There is no logical or practical connection between structure height and width and the number of cabinets affixed to it. Consider a typical pole-mounted facility in the public right-of-way with an equipment cabinet that holds the ancillary transmission equipment: permitting *by federal right* an additional equipment cabinet that protrudes *six feet* from the support structure illustrates the absurdity of CTIA's position. The Commission reasonably established a numerical limit to structure-mounted equipment cabinets because it correctly understood that structures and deployment conditions vary by location.[117] CTIA's contorted interpretation fails to overcome the clear and unambiguous separation of the number of cabinets as the first clause on Section 1.6100(b)(7)(iii) completely made distinct from changes in tower heights and ground cabinets set out in the remaining clause of the same section.[118]

There is no doubt that a ground-mounted equipment cabinet contains transmission equipment. Those cabinets can include radio frequency transmission and reception equipment; front-haul and back-haul communications links; signal processing equipment, and the like. Identically, remote radio units (sometimes also

[116] CTIA Petition at 14 (quoting *2014 Infrastructure Order* at ¶ 188).
[117] *See 2014 Infrastructure Order* at ¶ 194.
[118] *See* 47 C.F.R. § 1.6100(b)(7)(iii) (distinguishing between "equipment cabinets" and "ground cabinets" and showing that the Commission understood that equipment cabinets are often deployed on the support structure, not limited to wireless towers on private property).

called “remote radio heads”) can include radio frequency transmission and reception equipment, front-haul and back-haul communications links, signal processing equipment, and the like. CTIA suggests that the difference is the size and location of the equipment enclosure, not its function. To adopt the industry’s definition is nonsensical given that it is the function that controls, and locational visibility matters. The industry omits the fact that RRUs located near the antennas creates substantial visible bulk, as do RRUs and associated equipment above ground, and that bulk is more visible than ground mounted cabinets or for new cabinets installed existing enclosures.

The Commission’s long-standing four-cabinet rule for 6409(a) modifications has been a suitable and workable balance, but abandoning that rule as now sought by the wireless industry would create a loophole swallowing the underpinning principles of protecting against substantial increases in 6409(a) site modifications without any substantial protections for community aesthetics. Ultimately, the function of the cabinet must be the controlling factor, not its size especially where the industry asks for an unlimited number of far more visible equipment cabinets while ground mounted cabinets would be subject to the current rules thus creating two entirely different classes of rules for the same types of equipment cabinets.

The practical impact of CTIA’s proposal is to entirely eliminate the current numerical value set out in Section 1.6100(b)(7)(iii) and thereby remove one of the pillars of the *2014 Infrastructure Order* without offering any reasonable substitute other than its intended result that no limit is a good limit.

C. Prohibiting Local Governments from Enforcing Prior Conditions before Approving an Eligible Facilities Request is Contrary to Public Policy

WIA requests that the Commission amend 47 C.F.R. § 1.6100(b)(7)(vi) to "appl[y] only if the proposed modification would cause non-compliance with prior conditions imposed on a structure or site."[119] WIA contends that local governments improperly hold up eligible facilities requests to ensure compliance with the underlying permit that originally authorized the wireless use.[120] WIA's proposal and rationale runs contrary to good governance and would put public health and safety at risk.

The existing rule provides that, subject to a limited exception, a modification causes a substantial change if "it does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment . . . ."[121] Limiting the application of this rule to changes that *cause* non-compliance with prior conditions fails to recognize important realities.

Modification requests require applicants to submit construction drawings that show the existing and proposed conditions at the property. To the extent the wireless facility has fallen out of compliance with existing conditions of approval, local agencies may properly opt to require that the applicant remedy the non-

[119] WIA Decl. R. Petition at 15.
[120] *See id.* at 14.
[121] 47 C.F.R. § 1.6100(b)(7)(vi) (". . .provided however that this limitation does not apply to any modification that is non-compliant only in a manner that would not exceed the thresholds identified in § [1.6100(b)(7)(i)-(iv)" related to height, width, equipment cabinets and excavation or deployment outside the current site).

compliance in order to approve the modification plans. Although WIA criticizes the City of San Diego, California for refusing to interpret the *2014 Infrastructure Order* to require approval of facilities in violation of their permits, the city's approach is consistent with the text of the rule and responsible governance. Approving plans that show permit violations on their face, or do not accurately reflect the conditions at the property, would require the local agency to authorize conditions it knows to be in violation of the law. Consistent with the existing rule, modification plans that show permit violations would plainly "not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment," and approving sealed plans with known inaccuracies would raise serious questions of professional licensing law.[122] The Commission properly recognized these concerns in the *2014 Infrastructure Order* and Congress would not have intended applicants to obtain benefits under Section 6409(a) without complying with generally applicable legal requirements.

State and local governments also operate on limited resources. Without around-the-clock monitoring, a reviewing authority commonly discovers code compliance issues when the property owner or tenant applies to modify the site. For all types of development applications, not just wireless applications, it is common practice for local governments to require that these issues be resolved *before* issuing modification permits. The reasons are straightforward. To the extent the non-compliance involves a building or safety issue, approving a modification could

[122] *See generally* CAL. BUS. AND PROFESSIONS CODE §§ 6700 *et seq*.

exacerbate unsafe conditions. Moreover, when the applicant fails to comply with prior aesthetic conditions of approval, the permit applicant is already in a position to remedy the violation such that a code enforcement action needlessly wastes time and resources.[123] Permit non-compliance converts the use or structure into *illegal* non-conforming status that would reverse prior Commission policy that limited preemption to legal non-conforming uses and structures.[124]

Accordingly, the Commission should reinforce its commitment to preserving State and local authority to require compliance with prior permit conditions and other applicable rules as a precondition to approving an eligible facilities request.

D. WIA's Request to Clarify the Antenna Separation Rule for Towers to Mean the Same as Currently Provided Supports the Need for a Different Standard

WIA requests a clarification to the antenna separation rule that would not resolve the ambiguity.[125] To the extent that applicants and permitting agencies have adopted different interpretations, the prudent action would be to amend the rule for consistency with the height limitation for towers in the public rights-of-way and base stations.[126] This approach already has support in the *2014 Infrastructure Order* and in common sense.

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[123] Permit non-compliance must be resolved or permits can be revoked.
[124] *See 2014 Infrastructure Order* at ¶ 201.
[125] WIA Decl. R. Petition at 17.
[126] *See* 47 C.F.R. § 1.6100(b)(7)(i) (providing that a substantial change occurs when the modification "increases the height of the structure by more than 10% or *more than ten feet*, whichever is greater." (emphasis added)). Because the rule for towers outside the public rights-of-way and base stations avoids the messy calculations of separations from the nearest antenna, applicants and permitting agencies alike appear to have had little problem assessing compliance with this clearer standard.

First, the Commission found that "vertically collocated antennas often need 10 feet of separation" and that "a fixed minimum best serves the intention of Congress to advance broadband service by expediting the deployment of minor modifications of towers and base stations."[127] Neither the Petitions nor the record in the current infrastructure proceedings reveal that these findings have changed with respect to towers. Second, given that a fixed minimum best serves Congressional intent, and that there is no record evidence that the fixed standard for towers outside the public rights-of-way and base stations has caused similar confusion, applicants and local governments would be well-served to model the rule for towers on private property in the same vein.

E. WIA Provides No Support to Justify Changing the Existing Site Expansion Rules in the *2014 Infrastructure Order*

WIA appears to be anticipating a problem for which it has no evidence exists in the context of Section 6409(a). The Commission's codified regulation defines the "site" as follows:

> For towers other than towers in the public rights-of-way, the *current boundaries* of the leased or owned property surrounding the tower and any access or utility easements currently related to the site, and, for other eligible support structures, further restricted to that area in proximity to the structure and to other transmission equipment already deployed on the ground.[128]

[127] *2014 Infrastructure Order* at ¶ 193.
[128] 47 C.F.R. § 1.6100(b)(6) (emphasis added).

This rule clearly restricts new transmission equipment to the space "leased or owned" by the site operator at the time it requests approval.[129] In its favor, WIA cites several industry letters and provides site plans and photographs demonstrating the concept of a compound expansion. What these sources fail to show is whether any local government actually denied or delayed the expansion, whether the compound expansions even implicated questions that Section 6409(a) was intended to resolve, or whether the 30-foot proposal is even consistent with the types of compound expansions shown in the letters.[130] Despite these factual deficiencies, the Commission should reject the proposal because it already considered these issues in prior proceedings and the nature of tower modifications has largely remained the same.

1. The Commission Already Rejected WIA's Proposed Rule and Circumstances Have Not Changed to Justify a Policy Reversal

The Commission rejected an identical proposal by WIA (then known as "PCIA") in the *2014 Infrastructure Order*.[131] WIA urged the Commission to adopt the criteria for ground disturbance used in the Nationwide Programmatic

[129] *Id.*; *see also 2014 Infrastructure Order* at ¶ 198 (defining "the 'site' for towers outside of the public rights-of-way as the current boundaries of the leased or owned property surrounding the tower")
[130] *See* WIA RM Petition, Appendix (showing photographic examples of approved compound expansion, meaning that the compound was expanded with the benefit Section 6409(a) rule change); *id.* at 8 n.28 (citing a single example from a Crown Castle *ex parte* that a compound expansion implicated Section 106 review. The compound expansion was a 14-foot by 10-foot leasehold, 16 feet by 20 feet less than what WIA suggests, and Section 106 review does not implicate issues that Section 6409(a) can resolve); *id.* at 8 n.25 (citing an American Tower *ex parte* that alleges no misconduct from local governments and generally complains about historic preservation review with respect to compound expansions).
[131] *See 2014 Infrastructure Order* at ¶ 199 ("We also reject the PCIA and Sprint proposal to . . . allow applicants to excavate outside the leased or licensed premises.").

Agreement ("NPA") that would allow new expansions up to 30 feet *beyond* the existing leased or owned area.[132] But the Commission found the criteria in the NPA, which applies to replacement towers, inappropriate as a model for Section 6409(a), which applies only to replacement transmission equipment *on an existing* tower or base station.[133] Instead, the Commission found the approach in the Collocation Agreement, which applies to changes to existing facilities, more consistent with the limited statutory scope.[134]

In addition to the comparisons between Section 6409(a) and these programmatic agreements, the Commission cited with approval municipal comments that argued such expansions were both unnecessary and absurd.[135] The cited comments pointed out that substantiality "depends in large part on the specific circumstances where the change occurs" as demonstrated by variations in state legislation to implement Section 6409(a).[136] San Antonio's reply, also cited by the Commission, argued that:

> Additional construction or excavation over such a large area cannot in any sense be viewed as "insubstantial" under any circumstances. When coupled with industry's claim that utility or light poles and existing buildings should be viewed as "existing towers and base stations," PCIA's and Sprint's position becomes absurd. It would

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[132] *In the Matter of Accelerating Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, Comments of PCIA at 37–38 (Feb. 4, 2014).
[133] *See 2014 Infrastructure Order* at ¶ 199 (citing 47 U.S.C. § 1455(a)(2)(C)).
[134] *See id.*
[135] *See id.* (citing *In the Matter of Accelerating Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, CA Local Government Reply Comments at 12 (Mar. 5, 2014) [hereinafter "CA Local Government Reply Comments"]; *In the Matter of Accelerating Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, San Antonio Reply Comments at 15 (Mar. 5, 2014) [hereinafter "San Antonio Reply Comments"]).
[136] CA Local Government Reply Comments at 12.

> give providers unfettered license to construct on or excavate entire sections of sidewalks and streets.[137]

Nothing has changed since the Commission first rejected WIA's proposal. First, the plain text in Section 6409(a) still applies only to changes in transmission equipment on existing wireless towers and base stations.[138] A 30-foot compound expansion is ground space, not transmission equipment such that its addition necessarily causes a substantial change that justifies State or local review, subject to limitations in Section 332(c)(7). Just as the Commission found in the *2014 Infrastructure Order* that full support structure replacement did not fall within Section 6409(a)'s limited applicability to "transmission equipment," it should again find that Section 6409(a) does not authorize added, modified or replacement ground space.[139]

Second, the Collocation Agreement still more closely resembles the changes contemplated in Section 6409(a) than those covered by the NPA.[140] Replacement towers involve considerations that are beyond Section 6409(a)'s scope such that differences between the NPA and modifications to existing facilities warrant different treatment. The Commission already recognized that Section 6409(a) does

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[137] San Antonio Reply Comments at 15 (footnotes omitted).
[138] 47 U.S.C. § 1455(a)(2); *see also 2014 Infrastructure Order* at ¶¶ 181, 199.
[139] *See 2014 Infrastructure Order* at ¶¶ 181, 199.
[140] *Compare* 2017 Collocation Agreement, 47 C.F.R. Part 1, Appendix B, § I.E.4 (Sep. 1, 2017) (limiting applicability to "the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes, whether or not there is an existing antenna on the structure"), *with* NPA, 47 C.F.R. Part 1, Appendix C, § I (Mar. 7, 2005) (excluding modifications to existing facilities covered by the Collocation Agreement).

not encompass replacement structures.[141] WIA's request to harmonize the Section 6409(a) rules with the NPA would directly conflict with the Commission's well-reasoned prior interpretations.

Third, the Collocation Agreement still does not allow for ground disturbance outside the leased or owned areas.[142] Although the Commission based its analysis on the 2005 Collocation Agreement, the same restriction appears in versions as amended in 2016 and most recently in 2017.[143] And as the record in prior proceedings demonstrate, compound expansions are not a new phenomenon. The rationale supporting compound expansions has not changed, as every transition to the next generation of wireless technology requires incremental changes to existing equipment. Prospective 5G deployments are no different in this respect. That the Collocation Agreement was not amended to account for this, even with 5G on the horizon, further supports that WIA's proposal lacks merit.

Finally, the right to expand 30 feet beyond the current site boundaries is still plainly a substantial change by any measure.[144] A by-right 30-foot expansion

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[141] *See 2014 Infrastructure Order* at ¶¶ 181, 199.

[142] 2017 Collocation Agreement, 47 C.F.R. Part 1, Appendix B, § I.E.4 (Sep. 1, 2017) (defining a substantial change when collocation "would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site").

[143] *Compare* 2005 Collocation Agreement, 47 C.F.R. Part 1, Appendix B, § I.C.4. (Mar. 7, 2005) (defining a substantial change when collocation "would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site."), *with* 2016 Collocation Agreement, 47 C.F.R. Part 1, Appendix B, § I.E.4 (Aug. 29, 2016) (same), *with* 2017 Collocation Agreement, 47 C.F.R. Part 1, Appendix B, § I.E.4 (Sep. 1, 2017) (same).

[144] In sports, 30 feet is a first down in football, a three-point shot in basketball and the world record long jump. *Long Jump*, WIKIPEDIA (last visited Oct. 17, 2019), https://en.wikipedia.org/wiki/Long_jump.

appears to suggest that an additional 900 square feet would not be subject to local review in any context.[145] As an illustration, if the original compound is 12 feet by 12 feet, the applicant would be permitted to expand the site six times over without any local input. A fixed minimum, without variation in compound size and shape, especially when equipment compounds could be no larger than 100 square feet, would be arbitrary and capricious.

The rule adopted by the Commission in the *2014 Infrastructure Order* allowed for *no expansions* to tower sites on private property and only minimal expansions to base stations and sites in the public-rights-of-way.[146] As it did in 2014, the Commission should find that WIA offers no compelling justification to dramatically alter the Commission's established policy.

2. If the Commission Authorizes Large Compound Expansions, It Should Heed WIA's Suggestion and Refrain from Applying the Proposed Rule to Public Rights-of-Way

Although WIA limits the proposed rule change to "towers (other than towers in the public rights-of-way)," the Commission's public notice does not draw this same distinction.[147] To be clear, this proposal is even more absurd as applied to existing facilities within the public rights-of-way. For the reasons discussed below,

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[145] Even WIA's recent *ex parte* to the Commission shows that its proposed rule would allow for a 739.95-square-foot expansion to an average monopole site. *See* Letter from John A. Howes, Jr., Government Affairs Counsel, WIA, to Marlene H. Dortch, Secretary, FCC (Oct. 2, 2019) (showing a 49.33-foot by 15-foot compound expansion). The expansion area requested by WIA is roughly the size for an average apartment in most major United States cities. *See The Average Apartment Size of the Largest US Cities, Charted*, Digg (Jun. 26, 2019 9:37 PM), https://digg.com/2018/average-apartment-size-data-viz.

[146] *See* 47 C.F.R. § 1.6100(b)(6).

[147] *Compare* WIA RM Petition at 10 (requesting that the rule only apply to towers outside the public rights-of-way) *with* Public Notice at 1 (referencing the proposed rule only in the context of a "tower site").

the Commission should not apply it to towers or base stations in the public rights-of-way.

First, the Commission's existing regulations recognize that expansions to existing facilities in the public rights-of-way naturally present a "heightened potential for impact from extensions" to existing facilities, as well as "aesthetic, safety, and other issues . . . ."[148] Thus, the Commission adopted more restrictive substantial-change thresholds for facilities on utility structures and otherwise located in the public rights-of-way.[149] Thirty feet would be wider than most two-lane roads with parallel parking on both sides.[150] In many areas, this means that new ground-mounted cabinets and other transmission equipment could be placed across the street from the pole that supports the antenna. Such a rule would frustrate the careful efforts by communities to site new facilities closer to commercial uses when the street divides residential uses from non-residential uses, conceal equipment behind or within specific street features and contain the equipment within relative proximity to the support structure on which they are mounted.

Second, to the extent that the Commission does not heed WIA's suggestion to limit the applicability to private property towers, the Commission must reconfirm its commitment to preserving local authority to ensure compliance with right-of-way

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[148] *2014 Infrastructure Order* at ¶ 195.
[149] *See id.*; *see also* 47 C.F.R. § 1.6100(b)(7)(iii) (providing that a substantial change occurs in the right-of-way if the modification "involves installation of any new equipment cabinets on the ground if there are no pre-existing ground cabinets associated with the structure . . . .").
[150] *See Urban Street Design Guide: Lane Width*, NAT'L ASS'N OF CITY TRANSP. OFFICIALS (last visited Oct. 17, 2019), https://nacto.org/publication/urban-street-design-guide/street-design-elements/lane-width/.

management rules. The right-of-way is a narrow and dynamic space that cannot tolerate arbitrary site expansion rights.

F. WIA's Allegations That Jurisdictions Impede Site Fortification with Backup Power Are Not Supported by Facts

WIA makes an unsupported allegation that some unnamed "jurisdictions claim that . . . any collocation proposal that includes a generator constitutes a substantial change."[151] There is no evidence to suggest this is true and, in any event, the Commission's existing regulations already clearly allow backup power equipment so long as it complies with the substantial change criteria.

To be sure, a proposal to add a backup power source is likely to raise several issues. A typical diesel-powered generator is so large and requires so much space that it is likely to exceed several substantial-change thresholds or violate generally applicable health and safety codes. For example, generators require on-site fuel storage that require ignition-source setbacks pursuant to fire codes; noise pollution and noxious fumes may violate prior non-preempted permit conditions unrelated to height, width, equipment cabinets and excavation; and natural gas-powered generators may require excavation outside the current site to run a new gas line to the leased premises. As the examples suggest, these impacts stem from the Commission's well-reasoned proviso that any change that violates generally applicable health and safety regulations falls outside Section 6409(a).

To be sure, the Western Communities Coalition does not fundamentally oppose backup generators or other standby power sources. Our communities know

[151] *See* WIA Decl. R. Petition at 3.

full well that a resilient communications network can be a life-or-death issue in emergencies. But standby power sources themselves often involve combustible or otherwise hazardous materials that require close regulation by federal, state and local authorities. The Commission's existing regulations prudently leave enough room for state and local authority to consider public health and safety issues without the unwarranted time pressure from a Section 6409(a) shot clock. Accordingly, the Commission should reject WIA's unsupported claim and recognize that its existing regulations already strike the appropriate balance.

IV. COMPLIANCE WITH OBJECTIVE PUBLIC HEALTH AND SAFETY REQUIREMENTS

WIA makes sweeping generalizations regarding the purpose and practical function of local setbacks as public health and safety standards. Local development standards such as setbacks serve a variety of purposes depending on the context. Broad claims that setback and fall zone requirements do not relate to public safety are untethered to the facts and unpersuasive. WIA's generalizations cannot justify Commission action because they are not supported in fact or law.

A. Local Land Use Regulations Often Contain Objective Public Health and Safety Requirements

WIA claims that setbacks "are not related to the structural safety of towers" because "[s]etbacks generally exist in land use codes . . . ."[152] This is plainly untrue, as land use codes routinely concern public health and safety.

[152] WIA Decl. R. Petition at 20 n.19.

Derived from local police powers, land use regulations promote and protect public health, safety and welfare.[153] As the U.S. Supreme Court recognized in *Ambler Realty Co.*:

> There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits . . . and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances.

The U.S. Supreme Court also recognized that setbacks among or between certain land uses may serve to protect public health, safety and welfare. *See Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 71 n.34 (1976) (finding that an intent to mitigate crime associated with adult theaters justified a setback requirement among and between them).

Other examples include:

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[153] *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926); *accord* CAL. CONST. Art. 11, § 7 ("A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."); ENCINITAS, CAL., CODE § 9.70.010 ("regulations set forth in this chapter are adopted to serve, protect and promote the public health, safety and welfare"); *see also, e.g.*, DANVILLE, CAL. CODE § 32-1.1 (declaring the purpose of the zoning code, where its wireless facilities regulations are chaptered, is to "promote and protect the public health, safety, peace, comfort, and general welfare"); RICHMOND, CAL. CODE § 15.04.614.010 (providing that its wireless regulations, chaptered in the zoning code, are intended to reasonably regulated facilities "in a manner that promotes and protects public health, safety and welfare"); CERRITOS, CAL. CODE § 22.42.010 ("The regulations contained herein are designed to protected and promote public health, safety, community welfare and the aesthetic qualities of Cerritos as set forth in the goals and policies of the Cerritos general plan."); PLEASANTON, CAL. CODE § 18.110.005 ("The regulations contained herein are designed to protect and promote public safety and community welfare . . ."); TACOMA, WASH. CODE § 13.06.545 ("standards were developed to protect the public health, safety, and welfare"); SOUTH LAKE TAHOE, CAL., CODE § 6.55.010 (these "land use regulations are adopted to promote and protect the public health, safety, peace, comfort, convenience, general welfare and environment, natural and manmade").

- California Government Code § 65302(g) requires cities to develop a general plan that includes policies to keep local emergency communications facilities away from flood zones, high fire risk zones and other at-risk zones.

- California Government Code § 51182(a)(1) requires a minimum 100-foot setback between dry vegetation and any occupied structure in very high fire hazard severity zones.

- The San Anselmo Planning and Zoning Code requires building and fire safety officials to assess whether accessory dwelling units that encroach into certain setbacks leave space "sufficient for fire safety."[154]

- The Solana Beach Local Coastal Program, which implements the California Coastal Act's mandate to manage coastal conservation and development, requires structures and "new building improvements to be setback a safe distance from the bluff edge."[155] The city's General Plan also includes setback requirements from identified seismic fault lines.[156]

Accordingly, the Commission should reject the overbroad claim by WIA that land use regulations do not relate to public health and safety.

B. Setback Requirements Often Appear in Both Land Use Codes and Building Codes

WIA incorrectly asserts that setbacks "do not exist in building codes . . . ."[157] Setbacks *do* exist in building codes. For example:

- The 2019 California Building Code, Title 24, Part 2, Volume 1, Section 705 requires minimum setbacks between exterior walls on separate buildings.

- The 2019 California Fire Code Section 4906 requires setbacks between occupied structures and combustible vegetation in certain high-fire risk areas.

- The Encinitas Municipal Code contains multiple setback requirements in its Building and Construction Code, which include setbacks for erosion control

[154] *See* SAN ANSELMO, CAL., CODE § 10-6.207(e).
[155] *See* Solana Beach General Plan, Land Use Element § III.B (adopted by Resolution No. 2014-141 (Nov. 19, 2014)).
[156] *See* Solana Beach General Plan, Safety Element § 2.1.2 (adopted by Resolution No. 2014-141 (Nov. 19, 2014)).
[157] WIA Decl. R. Petition at 20.

and additional clearance between buildings and traffic lanes along highways and major arterials.[158]

- The Town of San Anselmo Public Works Code contains setback requirements for private wells to prevent subsidence and provide lateral and subjacent support to other parcels.[159]

- The City of San Ramon, California, requires setbacks between graded slopes and property lines "to provide for safety of adjacent property . . . [and the] safety of pedestrians and vehicular traffic . . . ."[160]

- The Solana Beach Municipal Code contains setbacks in its Excavation and Grading Code for erosion and drainage control.[161]

- The Rancho Palos Verdes Municipal Code contains setbacks for any building or structure, located under or above ground, as measured from any respective street side, interior side, front or rear property line. Additionally, setbacks apply to hillsides with a grade of 25% or more and slopes between properties greater than 6' or more.

Setbacks also exist in codes concerned with various other subject matters. For example:

- The City of Encinitas, California, regulates wireless facility deployment through its Public Health, Safety and Welfare Code.[162] All wireless facilities must be compliant with all applicable setbacks.[163] However, "[t]he applicant may propose to locate any wireless communications facility component within a required setback if the proposed location would reduce visual impact, improve safety or otherwise exhibit superior design attributes."[164]

- San Anselmo's Public Safety Code includes a fire safety setback on public storage facilities.[165]

- The City of San Ramon, California, establishes within its Public Works and Flood Control Code certain setback requirements for permanent structures in

[158] *See* ENCINITAS, CAL., CODE §§ 23.24.470, 23.36.060.
[159] *See* SAN ANSELMO, CAL., CODE § 7-13.07(b)(7).
[160] *See* SAN RAMON, CAL., CODE § C7-48.
[161] *See* SOLANA BEACH, CAL., CODE § 15.40.140.
[162] *See* ENCINITAS, CAL., CODE §§ 9.70.010 *et seq.*
[163] *Id.* § 9.70.020.
[164] *Id.* § 9.70.080.B.3.e.
[165] *See* SAN ANSELMO, CAL., CODE § 3-3.810.

the public rights-of-way that "would make unnecessarily difficult or make impractical the retention or creation of thoroughfares, adequate in alignment, dimensions and vision clearance to serve the public needs, safety and welfare."[166]

- The City of South Lake Tahoe, California, establishes a snow removal area adjacent to the right-of-way where no permanent or temporary improvements are permitted unless setbacks and other requirements are met, in order to avoid impeding snow removal operations.[167]

A "setback" refers to a minimum distance between structures or boundaries. Within the land use context, setbacks "are designed to ensure that enough light and ventilation reach the property and to keep buildings from being erected too close to property lines."[168]

Where a local regulation lives in a municipal code does not necessarily limit its purpose. Organizational structure often reflects the local government's judgement as to which department should administer the regulations and at what stage in the development process compliance should be assessed. Applicants and local public agencies alike could waste significant resources if the process required or allowed applications for building and construction permits to be reviewed on projects that could never meet setback requirements.

The absurdity in WIA's argument is clear when one considers that the Petitioners would hardly be satisfied if the same setback requirement appeared in the local building code.

C. The Petitions Offer No Evidence to Support Preemption for Any Setback Requirements

[166] *See* SAN RAMON, CAL., CODE § C6-111; *see also id.* § C6-113 (prohibiting building permits for permanent structures within the public right-of-way setback).
[167] *See* SOUTH LAKE TAHOE, CAL., CODE § 7.05.520.
[168] BLACK'S LAW DICTIONARY 1580 (10th ed. 2014).

Although WIA contends that local public agencies establish or adjust fall zones and setbacks to intentionally frustrate eligible facilities requests, the Petition fails to provide *a single concrete example*.

The case law on this issue does not bear out that generic claims about tower safety—like those advanced by WIA—are sufficient to overturn a denial based on noncompliance with a fall zone requirement. To be sure, some courts have overturned denials when the local public agency simply refuses to accept unrefuted evidence by qualified engineers.

Even if WIA could conjure a few bona fide examples to support its claim, isolated abuses are hardly a sufficient basis to preempt *all* fall zone and setback requirements. Such broad preemption would represent a significant shift in the Commission's stated policy that Section 6409(a) does not preempt objective health and safety regulations.[169] Whether a setback or fall zone requirement existed before or after the initial deployment, the record does not support preemption to the extent such requirement is objective and rationally relates to public health and safety.

V. CONDITIONAL APPROVAL ISSUES

Conditional approvals are not, as the Petitions suggest, tantamount to a denial. Section 6409(a) does not require local governments to *unconditionally* approve EFRs, and the Commission should reject the proposals by WIA and CTIA.

A. Regulatory Conditions on Permit Issuance

[169] *See 2014 Infrastructure Order* at ¶ 202; Brief for Respondent, *Montgomery Cty. v. FCC*, Nos. 15-1240 and 15-1284, Dkt. No. 60 at 42 (4th Cir. 2015).

WIA complains that local governments often condition permit issuance on escrow fees.[170] Local governments require escrow accounts from applicants due to their common experience with industry consultants who file applications, which cause local government staff to incur sometimes significant costs, only to later disappear and abandon the application. In plain terms, local governments require escrow accounts because applicants for wireless facilities have stiffed them on the bill.

Other examples cited in WIA's Petition for Declaratory Ruling lack a basis in law and/or fact. For example:

Concord, California: WIA claims that the City of Concord, California, imposes "onerous" conditions "to adopt a specific site maintenance schedule".[171] However, these "site maintenance agreements" are a nondiscriminatory measure used to ensure that properties subject to development permits are "maintained in a manner that is not detrimental or injurious to the public health, safety and general welfare and that its aesthetic appearance is continuously preserved in compliance with conditions of approval imposed by the review authority."[172] This requirement also closely tracks the Commission's own requirements for an eligible facilities request; namely, that a collocation or other modification must "comply with conditions associated with the siting approval of the construction or modification of

[170] WIA Decl. R. Petition at 21.
[171] *See* WIA Decl. R. Petition at 20, 20 n.58.
[172] *See* CONCORD, CAL., CODE § 18.520.030.

the eligible support structure or base station equipment" and must not "defeat the concealment elements of the eligible support structure."[173]

Beaverton, Oregon: WIA alleges that the City of Beaverton, Oregon, "attempts to condition approvals to require all conduit to be contained inside of existing poles."[174] However, the city's code allows new cables associated with collocations or modifications to be placed within *exterior* conduits.[175]

Although WIA does not provide any details that would allow the city to know precisely which member complained about which application, the city believes that this false allegation stems from a recent AT&T application in which the applicant proposed to place new cables risers within the pole as shown in **Figure 4**, below:

[173] *See* 47 C.F.R. §§ 1.6100(b)(7)(v)–(vi); *see also 2014 Infrastructure Order* at ¶ 214 n.595 ("State and local governments may continue to enforce and condition approval on compliance with non-discretionary codes reasonably related to health and safety . . . .").
[174] WIA Decl. R. Petition at 20 n.55.
[175] *See* BEAVERTON, OR., CODE § 60.70.35.19.M.2.

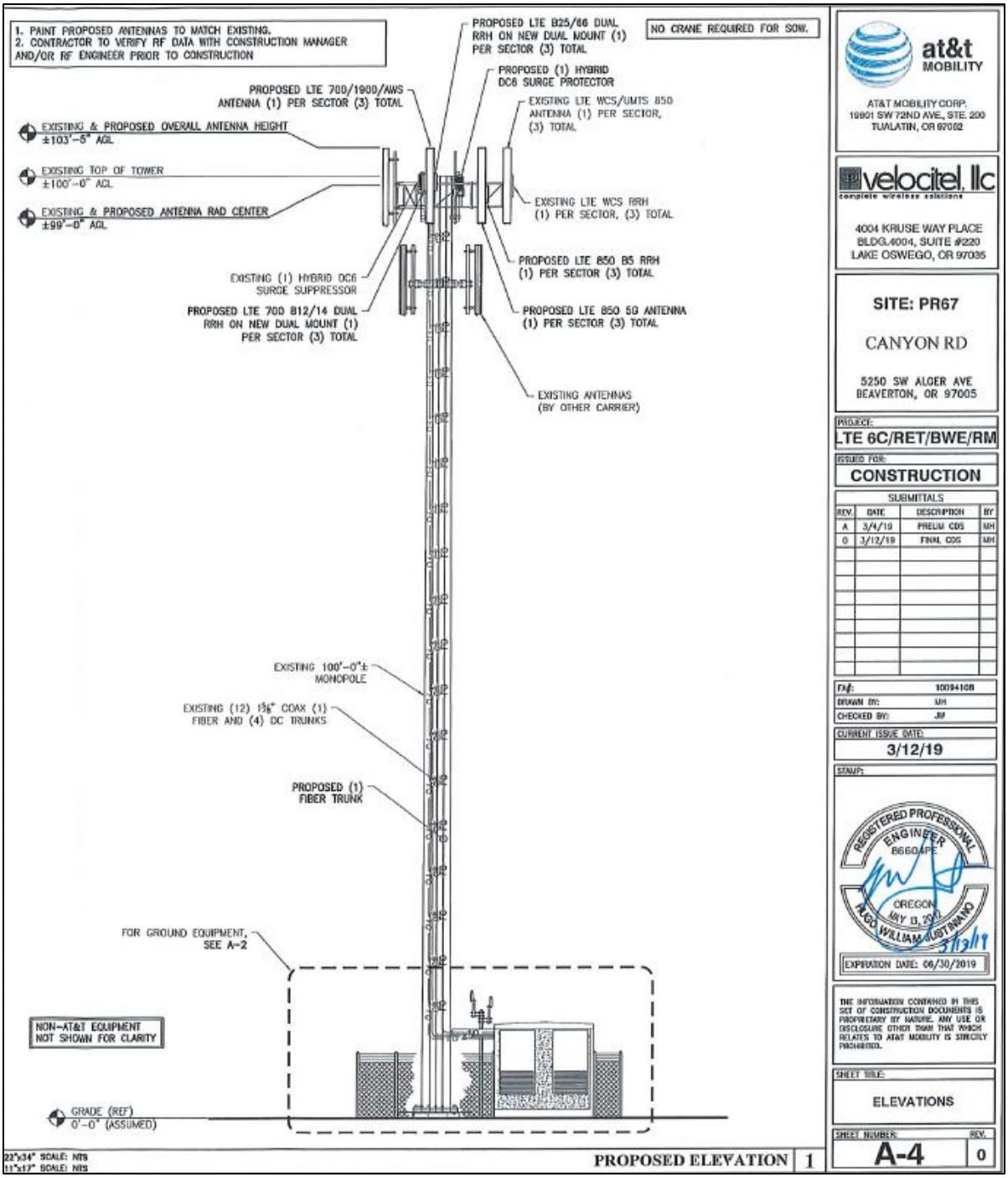

Figure 4: AT&T Modification Plans for Site PR67 (Mar. 12, 2019) depicting internal cable risers.

Based on the plans by AT&T to route the proposed cables through existing internal risers, the city included a reference to the internal cables as a condition on its approval letter. The applicant later requested that the city remove the condition and the city responded with information about how the applicant may formally

request a modification to the approval letter.[176] However, the applicant never filed the request or followed up with city staff on this issue.

B. Terms and Conditions in Proprietary Lease Agreements

WIA asks the Commission to invalidate conditions in lease agreements between site operators and local public agencies that clarify Section 6409(a)'s non-application to requests for modifications tendered to the government in its proprietary capacity as the landlord.[177] This request misconstrues the lease condition and how it operates, and conflicts with the Commission's prior determination that Section 6409(a) does not reach into proprietary relationships. The Commission should reject this request.

Conditions like those described by WIA have nothing to do with the state's or local government's obligation to approve permit applications for eligible facilities requests. These conditions merely clarify that the lease from the government to the provider is a proprietary function and not a regulatory one. A typical lease provision reads as follows:

> **7.3. City's Proprietary Capacity.** City and Licensee acknowledge that City enters this Agreement in its proprietary capacity as the owner or controller of the Property and agree that *any federal or state statutes, regulations or other laws applicable to City in its governmental capacity as a land-use regulator shall not be applied to City in its proprietary capacity as the licensor under this Agreement*. Only the terms in this Agreement

[176] The approval letter in question appears in **Exhibit P**. The letter requires only that the "wiring and cabling" be installed within conduit risers inside the tower.
[177] *See* WIA Decl. R. Petition at 21 n.61.

> govern the criteria and timeframes for Licensee's requests for approvals submitted under this Agreement.[178]

Provisions like these comport with the Commission's *2014 Infrastructure Order*, which correctly found that "Section 6409(a) applies only to State and local governments acting in their role as land use regulators and does not apply to such entities acting in their proprietary capacities."[179] Rather than force wireless tenants to sign away their rights under Section 6409(a), these provisions accurately reflect the distinction between regulatory and proprietary functions.

Moreover, these conditions help to avoid future confusion and unnecessary conflict as the parties administer their respective obligations under the agreement. Consider a scenario in which a carrier leases space on city hall for a wireless facility, with antennas on the facade and equipment cabinets mounted on the ground. If that carrier sought to add an additional antenna array on a parapet extension, the modification might be covered by Section 6409(a) but not authorized under the lease. A clear statement in the lease that the contract controls the landlord-tenant relationship between the parties avoids potential disputes that may arise from these situations.

WIA offers no justification to reverse the Commission's existing interpretation that Section 6409(a) does not preempt proprietary governmental conduct. Just as it did in the *2014 Infrastructure Order*, the Commission should

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[178] Wireless Communications License Agreement dated July 25, 2017, between the City of Concord, a California municipal corporation, and New Cingular Wireless PCS, LLC, a Delaware limited liability company (emphasis added).
[179] *2014 Infrastructure Order* at ¶ 239.

"decline at this time to further elaborate as to how this principle should apply to any particular circumstance in connection with Section 6409(a)."[180]

VI. APPLICATION REQUIREMENT ISSUES

The Commission should reject proposals by WIA to further restrict application materials required to process eligible facilities requests and related permits and approvals.[181] As the Commission correctly found in the *2014 Infrastructure Order*:

> nothing in [Section 6409(a)] indicates that States or local governments must approve requests merely because applicants claim they are covered. Rather, under Section 6409(a), only requests that do in fact meet the provision's requirements are entitled to mandatory approval. Therefore, States and local governments *must have an opportunity to review applications to determine whether they are covered by Section 6409(a)*, and if not, whether they should in any case be granted.[182]

At the same time, the Commission found that:

> in connection with requests asserted to be covered by Section 6409(a), State and local governments may only require applicants to provide documentation that is *reasonably related to determining whether the request meets the requirements of* [*Section 6409(a)*].[183]

But the deployment process involves more than merely a determination as to whether an application tendered as an eligible facilities request involves a collocated, modified or replaced transmission equipment on an existing wireless tower or base station without a substantial change in its physical dimensions.

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[180] *2014 Infrastructure Order* at ¶ 240.
[181] *See* WIA Decl. R. Petition at 21–24.
[182] *2014 Infrastructure Order* at ¶ 211 (emphasis added).
[183] *Id.* at ¶ 214 (emphasis added).

After that initial determination, local officials must still check for "compliance with non-discretionary codes reasonably related to health and safety, including building and structural codes."[184] These regulations often concern the structure itself and the other equipment or improvements already installed or constructed.

Moreover, the approvals often run with the land, which requires local officials to evaluate other issues such as whether the applicant has authority to bind the property and its owner to the terms and conditions associated with the permit. These approvals may also require public notice, which in turn requires the applicant to provide notice materials and take actions to effect those notices.

The Commission's *2014 Infrastructure Order* correctly recognized that an eligible facilities request may require more than one permit or approval before construction may commence.[185] These other permits and approvals include "the zoning process" as well as "compliance with non-discretionary . . . building and structural codes[,]" and the Commission made clear that its restrictions on certain application requirements "does not prohibit . . . documentation needed to demonstrate compliance with any such applicable codes."[186]

A. Compliance with RF Exposure Guidelines

1. Section 332(c)(7)(B)(iv) and the Commission's Precedents Recognize the Legitimate Local Interest in Compliance with the Commission's Guidelines for RF Exposure

[184] *Id.* at ¶ 214 n.595.
[185] *Id.*
[186] *Id.*

The Commission should reject any insinuation by WIA that state and local governments cannot evaluate a proposed modification to an existing wireless tower or base station for compliance with the Commission's guidelines for RF exposure. Neither the plain language in the Communications Act nor the Commission's precedents so much as suggest that local public agencies may not question whether a proposed or existing personal wireless service facility complies with applicable RF exposure standards.

Section 332(c)(7) makes clear that local public agencies may regulate personal wireless service facilities that violate applicable RF exposure standards. Section 332(c)(7)(B)(iv) provides that:

> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions *to the extent that such facilities comply with the Commission's regulations* concerning such emissions.[187]

"That language, by its own terms, requires compliance with federally-established RF emissions levels as a prerequisite to preemption."[188]

Congress' express proviso in the statutory text makes clear that local authority to regulate based on RF exposure begins where compliance with the Commission's guidelines end. Thus, Congress intended—at the bare minimum—to

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[187] 47 U.S.C. § 332(c)(7)(B)(iv) (emphasis added).

[188] *Sprint Spectrum, L.P. v. Twp. of Warren Planning Bd.*, 737 A.2d 715, 722 (N.J. 1999). Section 332(c)(7)(A), which preserves all state and local zoning authority unless expressly preempted in Section 332(c)(7)(B), removes any doubt as to the narrow preemption in Section 332(c)(7)(B)(iv). *See* 47 U.S.C. § 332(c)(7)(A); *accord Warren Planning Bd.*, 737 A.2d at 722.

preserve local authority to require an applicant for any personal wireless service facility to demonstrate compliance with the Commission's exposure standards.[189]

State and local authority is equally clear in the Commission's precedents. In 2000, the Commission's *RF Procedures Order* expressly recognized local public agencies' "legitimate interest" in site operators' compliance with the Commission's exposure standards and explicitly declined to preempt local requirements to demonstrate such compliance.[190] Rather than broad preemption, the Commission found that case-by-case approach to consider whether "a particular requirement to demonstrate compliance violates Section 332(c)(7)" is more appropriate.[191]

With respect to eligible facilities requests, the Commission found that Section 6409(a) does not cover proposed changes that would violate objective health and safety regulations. In particular, the Commission stated that:

> States and localities may continue to enforce and condition approval on compliance with generally applicable building, structural, electrical, and safety codes and with other laws codifying objective standards reasonably related to health and safety.[192]

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[189] *See Warren Planning Bd.*, 737 A.2d at 723 ("[An applicant] is not, by virtue of the Act, exempt from showing that it complies, it is merely exempt from a locally-imposed and more stringent emissions standard.").

[190] *In re Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, Report and Order, WT Docket No. 97-192, 15 FCC Rcd. 22821, ¶ 18 (Nov. 13, 2000) ("We recognize that State and local governments have a legitimate interest in ascertaining that facilities will comply with the RF exposure limits set forth in our rules.") [hereinafter "*RF Procedures Order*"].

[191] *Id.* at ¶ 18 (Nov. 13, 2000) ("[W]e do not believe any binding rule governing demonstrations of compliance is necessary. To the extent that any party may argue in a properly filed case that a particular requirement to demonstrate compliance violates Section 332(c)(7), we will consider the issue in that context.").

[192] *2014 Infrastructure Order* at ¶ 188; *see also id.* at ¶ 214 n.595 ("State and local governments may continue to enforce and condition approval on compliance with non-discretionary codes reasonably related to health and safety, including building and structural codes.").

And that:

> [M]any local jurisdictions have promulgated code provisions that encourage and promote collocations and replacements through a streamlined approval process, while ensuring that any new facilities comply with building and safety codes and applicable Federal and State regulations. Consistent with that approach on the local level, we find that Congress did not intend to exempt covered modifications from compliance with generally applicable laws related to public health and safety.[193]

The Commission found that these requirements addressed concerns raised by commenters that changes should not be permitted if they "violated . . . a federal law or regulation, including environmental law, historic preservation law, Commission *RF exposure standards* . . . ."[194]

Most recently in the *Small Cell Order*, although the Commission broadly preempted state and local authority over many issues related to small wireless facilities, it "note[d] that the Small Wireless Facilities . . . remain subject to the Commission's rules governing Radio Frequency (RF) emissions exposure."[195] This same proviso appears in the Commission's codified definition for a small wireless facility.[196]

Protecting public health and safety are among the most important functions local public agencies serve. Moreover, local public agencies are best situated to assess compliance with the Commission's standards. No other agency performs this function, nor has the capacity to, with respect to wireless facilities. Local

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[193] *Id.* at ¶ 202 (internal footnotes omitted).
[194] *See id.* at ¶ 204 n.556 (emphasis added).
[195] *Small Cell Order* at ¶ 33.
[196] 47 C.F.R. § 1.6002(*l*)(6).

governments are directly responsible for approving the permits that authorize construction and reviewing applications for compliance with all other applicable safety regulations. As a matter of administrative economy, it makes sense that the local public agency would also oversee the submittal of sufficient RF documentation that demonstrates compliance with the Commission's guidelines.

The Commission correctly recognized that it "is not a health and safety agency."[197] Nor is self-policing is a viable option as local agencies' experience reveals that compliance is not a mere formality.[198] Given that Commission staff cannot review all modification applications and applicants may prioritize other interests over strict compliance with RF safety rules, it makes common sense to continue to preserve State and local authority to play this critical role. Any other approach would be reverse longstanding Commission policy without any support in the Petitions that local review contravenes the Commission's guidelines or frustrates the implementation of Section 6409(a).

2. Allegations by WIA that Cities Require "RF Reports *for Local Approval*" are Demonstrably False

WIA misleadingly alleges that several coalition members impose their own local RF exposure requirements.[199] These local public agencies do not require

[197] *See* Letter from Julius Knapp, Federal Communications Commission, Office of Engineering and Technology, to Michael P. Flynn, U.S. Environmental Protection Agency, Office of Radiation and Indoor Air (Feb. 4, 2015), https://ecfsapi.fcc.gov/file/1081962319406/13-84D.pdf.
[198] *See e.g.*, Email from Vincent Voss, Professional Services Specialist, SAC Wireless, to Sean del Solar, Associate Planner, City of San Marcos, Cal. (Oct. 2, 2019) (confirming that plans submitted to the city for approval did not have EME requirements incorporated after Mr. del Solar noticed the discrepancy and inquired with the applicant).
[199] WIA Decl. R. Petition at 22.

applicants to meet *local* standards. Rather, applicants must demonstrate to these public agencies that the proposed facilities meet *the Commission's* standards.

For example:

Carlsbad, California: WIA misleadingly alleges that the City of Carlsbad, California, requires applicants to submit "RF reports *for local approval*."[200] In fact, as plainly stated in the city's regulations, the city reviews the report for compliance with applicable ANSI/IEEE standards adopted by the Commission.[201] Moreover, this required review does not forestall deployment because it occurs "[w]ithin six (6) months *after the issuance of occupancy*" and only when applicant fails to show the personal wireless facility qualifies for a categorical exclusion under the Commission's RF exposure guidelines.[202] The preamble to the city's regulations also recognizes that "[i]f federal standards are met, cities may not deny permits on the grounds that radio frequency emissions (RF) are harmful to the environment or to the health of residents."[203] WIA's allegation is without merit.

Encinitas, California: WIA misleadingly alleges that the City of Encinitas, California, requires applicants to submit "RF reports *for local approval*."[204] In fact, the city's municipal code requires only that the applicant demonstrate compliance "with all terms and conditions and emissions standards imposed by the Federal

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[200] WIA Decl. R. Petition at 22 n.64 (emphasis in original).
[201] *See* CARLSBAD, CAL., POLICY NO. 64 § D.5; *see also* Affidavit of Don Neu, City Planner, Carlsbad, California (Oct. 28, 2019).
[202] *See id.* §§ D.5 and E.1.d.
[203] *See id.* at 2 (describing federal restrictions on local authority).
[204] WIA Decl. R. Petition at 22 n.64 (emphasis in original).

Communications Commission."[205] Consistent with this requirement, the city's application checklist requires applicants to submit:

> a Radio Frequency Emission (RFE) report. A cumulative report is required if multiple carriers are present on the subject location).[206]

Once the city receives an RF compliance report, staff will check the report to ensure it pertains to the correct facility and concludes that the proposed modification complies with the Commission's guidelines.

Escondido, California: WIA misleadingly alleges that the City of Escondido, California, requires applicants to submit "RF reports *for local approval*."[207] In fact, the city's municipal code requires that:

> Applicants shall submit a theoretical radiofrequency radiation study (prepared by a person qualified to prepare such studies) with the application which quantifies the proposed project's radiofrequency emissions, *demonstrating compliance of the proposed facility with applicable NCRP and ANSI/IEEE and FCC policies, standards, and guidelines* for maximum permissible exposure (MPE) to radiofrequency radiation emissions. The study shall also include a combined (cumulative) analysis of all the wireless operators/facilities located on and/or adjacent to the project site, identifying total exposure from all facilities and demonstrating compliance with FCC guidelines. An updated radiofrequency study shall be submitted for any modification to a facility.[208]

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[205] *See* ENCINITAS, CAL., CODE § 9.70.080.C.4.b.
[206] *Wireless Communication Facility Application Supplement*, Encinitas Development Service Dept. 4 (Nov. 11, 2017), https://www.cityofencinitas.org/Portals/0/City%20Documents/Documents/Development%20Services/Planning/Land%20Development/Wireless%20Communication%20Facility%20Application%20Supplement.pdf?ver=2017-11-27-114516-087.
[207] WIA Decl. R. Petition at 22 n.64 (emphasis in original).
[208] ESCONDIDO, CAL., CODE § 33-705(c).

Applicants must also explain who prepared the report and the preparer's qualifications.[209] Although the city "reserves the right to . . . verify compliance with the Federal Communication Commission's standards for [RF] emissions", this prudent step does not purport to allow the city to set the standards for RF exposure.[210]

King County, Washington: WIA misleadingly alleges that King County, Washington, requires applicants to submit "RF reports *for local approval*." This is simply untrue. At the time WIA filed its petition, King County did not, and still does not, require any RF report of any kind as a precondition to approval. The county does require successful applicants agree to avoid causing interference by adhering to standards set by the Washington Cooperative Interference Committee, but even here no RF report is required.[211]

La Mesa, California: WIA misleadingly alleges that the City of La Mesa, California, requires applicants to submit "RF reports *for local approval*."[212] However, the city requires only that the applicant demonstrate that the facility will not exceed "[t]he maximum output level *as allowed under FCC regulations*."[213] For macro facilities outside the public rights-of-way, the city's one-page supplement also

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[209] ESCONDIDO, CAL., CODE § 33-705(a)(2).
[210] *See id.* § 33-705(b). A separate provision in the city's code requires the applicant to demonstrate actual compliance after construction but does not mention any standard or requirement for city review or approval. *See id.* § 33-704(e).
[211] Affidavit of Michael Kulish, Real Property Supervisor for King County (Oct. 28, 2019) (attached as **Exhibit K**). *See, e.g.*, WWCIC Engineering Standard #6.
[212] WIA Decl. R. Petition at 22 n.64 (emphasis in original).
[213] *See* La Mesa City Council Resolution 2001-113, Exh. B, § D.2, http://www.cityoflamesa.com/DocumentCenter/View/12974/Design-Guidelines-for-Wireless-Communication-Facilities (emphasis added).

requires "an Electromagnetic (EME) Site Compliance Report" as a means to verify compliance with the Commission's regulations.[214] Nothing in the city's code, guidelines or application materials remotely suggests that the city sets its own standards for local approval.

San Diego, California: WIA misleadingly alleges that the City of San Diego, California, requires applicants to submit "RF reports *for local approval*."[215] The city's published application requirements and detailed guidance expressly require only that the applicant demonstrate compliance with the *Commission's* RF exposure guidelines.

The city's application checklist requires that an applicant for an eligible facilities request submit an "RF Letter of Compliance/RF Compliance Report".[216] The city also publishes detailed guidance for applicants, which includes information about RF compliance demonstrations:

> RF emissions are regulated by the Federal Government. . . . W[ireless communication facilitie]s must comply with the FCC's standards for RF radiation. *The City collects a cumulative RF Report to demonstrate compliance with Federal regulations prior to permit approval.* A Letter of Compliance or RF report is required at the time of initial submittal. If a letter is initially submitted in lieu of an RF Report, the letter must be on wireless carrier company letterhead, acknowledge that a complete cumulative RF report is required prior to a project approval, and it must be signed by a licensed RF engineer. An RF Report is not

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[214] *See Wireless Communications Supplemental Questionnaire*, La Mesa Planning Division (last visited Oct. 21, 2019), http://www.cityoflamesa.com/DocumentCenter/View/12971/Wireless-Supplemental-Questionnaire.
[215] WIA Decl. R. Petition at 22 n.64 (emphasis in original).
[216] *Form DS-420: Wireless Communication Facilities Supplemental Application and Checklist*, San Diego Development Services Department (May 2019), https://www.sandiego.gov/sites/default/files/dsdds420.pdf.

> required for projects that are only adding a generator to an existing site, unless there is none on file for the original project.[217]

As clearly stated in the city's guidance, these requirements exist solely to ensure that applicants comply with federal—not local—RF exposure requirements.

These requirements are hardly burdensome.[218] Applicants may tender their applications without a full RF compliance report so long as they provide an appropriate letter from an engineer.[219] No report is needed for generator additions to sites previously demonstrated to be in compliance.[220] Once the city receives an RF compliance report, staff will check the report to ensure it pertains to the correct facility and concludes that the proposed modification complies with the Commission's guidelines.[221]

San Marcos, California: WIA misleadingly alleges that the City of San Marcos, California, requires applicants to submit "RF reports *for local approval*."[222] San Marcos requires applicants to submit "a theoretical assessment of compliance with all applicable [Commission] radio frequency (RF) guidelines."[223] Although the

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[217] *Information Bulletin 536: Submittal Requirements and Procedures for Wireless Communication Facilities*, San Diego Development Services Department § III.G (Sep. 2019), https://www.sandiego.gov/sites/default/files/dsdib536.pdf (emphasis added).
[218] *See* WIA Decl. R. Petition at 23.
[219] *Information Bulletin 536: Submittal Requirements and Procedures for Wireless Communication Facilities*, San Diego Development Services Department § III.G (Sep. 2019).
[220] *Id.* § III.G.
[221] Affidavit of Karen Lynch, Development Project Manager III, City of San Diego, California (Oct. 24, 2019) (attached as **Exhibit Q**). Occasionally, when an RF compliance report recommends a physical barrier (such as plastic chains on a rooftop), the city will request that the applicant consult with their RF engineers to determine whether less visible mitigation steps (such as floor stripes) could be feasible. However, the city does not deny applications solely on the basis that the facility would require mitigations for compliance with the Commission's guidelines.
[222] WIA Decl. R. Petition at 22 n.64 (emphasis in original).
[223] *See* CARLSBAD, CAL., CODE § 20.465.060.A.7.

city would consider a plainly erroneous report as incomplete, nothing in its regulations purports to subject the report to "local approval" as alleged by WIA.

Solana Beach, California: WIA misleadingly alleges that the City of Solana Beach, California, requires applicants to submit "RF reports *for local approval*."[224] In fact, as plainly stated in the city's regulations, the city reviews the report for compliance with applicable ANSI/IEEE standards adopted by the Commission.[225] Moreover, this required review does not forestall deployment because it occurs "[w]ithin six (6) months *after the issuance of occupancy*" and only when applicant fails to show the personal wireless facility qualifies for a categorical exclusion under the Commission's RF exposure guidelines.[226]

Solana Beach also takes significant steps to make clear that its regulations are intended only to ensure that deployments meet the Commission's standards. The city's regulations expressly state that its policies are:

> not intended to, nor shall it be interpreted or applied to: deny any request for authorization to place, construct or modify personal wireless service facilities on the basis of environmental effects of radio frequency emissions to the extent that such wireless facilities comply with the FCC's regulations concerning such emissions.[227]

A separate section recognizes that "[i]f federal standards are met, cities may not deny permits on the grounds that radio frequency emissions (RF) are harmful to

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[224] WIA Decl. R. Petition at 22 n.64 (emphasis in original).
[225] *See* SOLANA BEACH, CAL., POLICY NO. 64, Part I, § C.5; Affidavit of Joseph Lim, Director of Community Development, City of Solana Beach, California (Oct. 23, 2019).
[226] *See* SOLANA BEACH, CAL., POLICY NO. 64, Part II, § C.2.g.
[227] *See id.* at 2.

the environment or to the health of residents."[228] And a third section devoted entirely to "Health Concerns & Safeguards" explains that the Commission sets the applicable standard for human exposure to RF emissions.[229]

Thurston County, Washington: WIA misleadingly alleges that the Thurston County, Washington, requires applicants to submit "RF reports *for local approval*."[230] However, the county code requires only that the applicant demonstrate compliance with the Commission's standards:

> The applicant shall submit for the proposed facility a . . . power density calculations expressed as micro-watts per square centimeter and other technical documentation, signed by a radio frequency engineer licensed in the state of Washington, as necessary to demonstrate the proposed facility's *compliance with FCC guidelines/standards* for radiofrequency electromagnetic field strength.[231]

Although the industry complains that local public agencies reserve the right to "approve" the applicant's RF compliance report, this modest reservation is a prudent response to the occasionally wrong information used by applicants or their vendors to evaluate compliance. Common errors include reports that evaluate "worst-case emissions" based on equipment that does not match the proposed construction plans and failures to consider cumulative emissions from collocated antennas.[232] These errors do not require an advanced physics degree to spot. Many

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[228] *See id.* at 3.
[229] *See id.* at 4.
[230] WIA Decl. R. Petition at 22 n.64 (emphasis in original).
[231] THURSTON CTY., WASH., CODE § 20.33.050.1.h (emphasis added); *see also* Affidavit of Robert Smith, Senior Planner, Thurston County (Oct. 25, 2019).
[232] *See* 47 C.F.R. § 1.1307(b)(3) ("[W]hen the guidelines specified in § 1.1310 are exceeded in an accessible area due to the emissions from multiple fixed transmitters, actions necessary to bring the area into compliance are the shared responsibility of all licensees whose transmitters produce, at the

may be innocent mistakes but still require correction. Moreover, these concerns raised about "local approval" are really nothing more than a local requirement demonstrating compliance with federal standards—something the Commission has previously recognized is within the authority of local governments to consider.

3. Network Densification Often Results in Cumulative Emissions from Multiple Emitters and Amplifies the Local Interest in Compliance with the Commission's RF Exposure Guidelines

Commission guidelines for RF exposure have long recognized the potential risks associated with multiple transmitter sites.[233] Network densification, whether by collocations under Section 6409(a) or newly deployed small wireless facilities,[234] results in an increase in multiple transmitter sites and/or accessible areas affected by multiple transmitters. Thus, the legitimate local interest in compliance with the Commission's RF exposure guidelines is at least as strong—if not stronger—when a provider proposes to collocate additional transmitters through an eligible facilities request.

Importantly, the compliance evaluation in multiple transmitter environments encompasses more than just the additional transmitters. The evaluation must

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area in question, power density levels that exceed 5% of the power density exposure limit applicable to their particular transmitter or field strength levels . . . .").

[233] 47 C.F.R. § 1.1307(b)(3); *In the Matter of Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, Second Memorandum Opinion and Order, WT Docket No. 97-192, 12 FCC Rcd. 13464, ¶¶ 58, 67–68 (Aug. 25, 1997).

[234] In the small cell context, service and infrastructure providers alike complain that they should not be required to perform a site-specific RF exposure compliance evaluation when all the small wireless facilities in its proposed deployment use the same equipment. To be sure, the fact that all such facilities would use the same antennas (with the same frequencies and gain) and the same radios (with the same output wattage) simplifies the review process. But this rationale ignores critical contextual factors in the Commission's own standards, such as proximity to general population members, time averaging and cumulative exposure levels caused by nearby transmitters.

account for "*all* significant contributors to the ambient RF environment".[235] Although the Commission defines significance as more than a 5% contribution towards the applicable exposure limit, each contributor must be independently evaluated to determine whether it meets this threshold.[236] Local practices to collect and evaluate the cumulative emissions from collocated facilities—like those adopted by San Diego—reflect this guidance by the Commission.[237]

Yet an RF compliance report based on predictive models may not always be reliable in multiple-transmitter environments. The Commission's guidance for compliance evaluations in multiple-transmitter environments suggests that on-site tests may be necessary:

> When there are multiple transmitters at a given site collection of pertinent technical information about them will be necessary to permit an analysis of the overall RF environment by calculation or computer modeling. However, if this is not practical *a direct measurement survey may prove to be more expedient for assessing compliance* . . . .[238]

The only feasible way to assess compliance in these circumstances is to authorize construction conditioned on a post-construction actual compliance demonstration.

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[235] OET Bulletin 65 (ed. 97-01) at 33, https://transition.fcc.gov/Bureaus/Engineering_Technology/Documents/bulletins/oet65/oet65.pdf (emphasis in original).
[236] *See id.* at 32.
[237] *Information Bulletin 563: Submittal Requirements and Procedures for Wireless Communication Facilities*, San Diego Development Services Department § III.G (Sep. 2019), https://www.sandiego.gov/sites/default/files/dsdib536.pdf
[238] OET Bulletin 65 (ed. 97-01) at 33 (emphasis added); *see also Local Official's Guide* at 13 ("A large number of variables . . . make the calculations more time consuming, and make it difficult to apply a simple rule-of-thumb test.").

Accordingly, the Commission should decline to reverse its prior decisions and preempt state and local authority to require applicants for eligible facilities requests to demonstrate actual compliance with the Commission's own RF exposure guidelines.

B. Prior Permits, Approvals and Other Records

As a threshold matter, the Commission should note that this requirement is not more burdensome on wireless infrastructure than it would be for any development project. Many local governments require applicants to include past permit records whenever *any* applicant requests a modification to *any* structure.[239]

1. These Requirements Reasonably Relate to Whether a Proposed Modification Qualifies as an Eligible Facilities Request

Application requirements that applicants provide the prior permits associated with the facility directly relate to whether a proposed modification qualifies as an eligible facilities request.

First, the requirement directly relates to whether the application proposes to alter an "existing" wireless tower or base station. Section 6409(a) applies only to requests to collocate, modify or replace transmission equipment on "an *existing* wireless tower or base station."[240] Per the Commission's own definition:

> A constructed tower or base station is existing for purposes of this section *if it has been reviewed and approved under the applicable zoning or siting process*, or under another State or local regulatory review process,

[239] *See, e.g.*, *Zoning Permit Instructions & Checklist*, Los Angeles County at 6 (2019), available at: http://planning.lacounty.gov/assets/upl/apps/zoning-permit-checklist.pdf (requiring building permit records for structures on the property).
[240] 47 U.S.C. § 1455(a)(1) (emphasis added).

> provided that a tower that has not been reviewed and approved because it was not in a zoned area when it was built, but was lawfully constructed, is existing for purposes of this definition.[241]

In other words, the wireless tower or base station must have both a physical and legal existence for an alteration to qualify as an eligible facilities request.[242]

The most obvious and expeditious method to establish whether a physical tower or other support structure "has been reviewed and approved under the applicable zoning or siting process" is to simply produce the permits or other approvals. This is especially true for older facilities because the applicable zoning or siting process for the original approval may have changed by the time an applicant seeks a modification.

Second, the requirement also directly relates to whether the proposed alterations would cause a substantial change. Per the Commission's own definition:

> A modification substantially changes the physical dimensions of an eligible support structure if it . . . does not *comply with conditions associated with the siting approval* of the construction or modification of the eligible support structure or base station equipment, provided however that this limitation does not apply to any modification that is non-compliant only in a manner that

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[241] 47 C.F.R. § 1.6100(b)(5) (emphasis added); *see also 2014 Infrastructure Order* at ¶ 174 ("[T]he term "existing" requires that wireless towers or base stations have been reviewed and approved under the applicable local zoning or siting process or that the deployment of existing transmission equipment on the structure received another form of affirmative State or local regulatory approval (*e.g.*, authorization from a State public utility commission).").

[242] *See 2014 Infrastructure Order* at ¶ 174. Sound public policy underpins this requirement. As the Commission noted in the *2014 Infrastructure Order*, this interpretation "ensures that a facility that was deployed unlawfully does not trigger a municipality's obligation to approve modification requests under Section 6409(a)." *Id.* Alongside this interpretation, the Commission quoted comments by Fairfax County that "[a] tower or structure illegally constructed is not sanitized by [Section] 6409(a)." *Id.* at 174 n.468.

> would not exceed the thresholds identified in § [1.6100](b)(7)(i) through (iv).[243]

Put differently, whether a proposed modification causes a substantial change depends on whether it violates certain conditions in the underlying approval—so long as those proposed modifications would not otherwise be consistent with the thresholds identified in Section [1.6100](b)(7)(i) through (iv).

Conditions routinely appear in the permit or other approval. Even if certain conditions are preempted by 47 C.F.R. §§ 1.6100(b)(7)(i) through (iv), the state or local government will need to review those conditions to make that determination. Thus, a requirement to submit the associated permits or other approvals directly relates to the evaluation under 47 C.F.R. § 1.6100(b)(7)(vi).

Courts have upheld similar record-keeping requirements imposed on providers by state or local governments. For example, the court in *City of Portland v. Electric Lightwave, Inc.*, 452 F. Supp. 2d 1049 (D.Or. 2005), upheld the city's requirement that a franchisee maintain and produce records on gross revenues because "[i]t would be incongruent for the court to find that the fees were permissible under the [Act], but prohibit the City from any accounting . . . ."[244]

The same logic applies with equal force in this context. State and local governments cannot be expected to assess compliance with prior approvals and permit conditions within an extremely short timeframe if the Commission preempts their authority to require applicants to submit those prior approvals and permit

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[243] 47 C.F.R. § 1.6100(b)(7).
[244] *City of Portland v. Electric Lightwave, Inc.*, 452 F. Supp. 2d 1049, 1063 (D.Or. 2005).

conditions with their initial applications.[245] To the extent the Commission preempts local authority to include permit records as an application requirement, the shot clock would run during this investigative period and applicants would have little incentive to agree to tolling if the failure to produce such evidence would lead to a denial. Rather, as the industry's proposed deemed granted remedy suggests, their members would rather the shot clock run to claim mandatory approval.

2. Applicants Are in the Best Position to Provide Prior Permits, Approvals and Other Records

First, as the beneficiary under the Commission's regulations, the applicant properly bears the burden to show that its modification meets all the criteria for an eligible facilities request.[246] Although applicants often complain that local governments should just have these records on file, what they are really requesting are special privileges, afforded to no other entities that do business in a community, demanding that the local government perform the applicant's record keeping obligations. Any business receiving any kind of federal, state or local government regulatory approval has obligations to maintain documentation to demonstrate that approval. A local government should not be required to produce records to support an applicant's request any more than the SEC should be required to produce records to support a public company's annual filing, or USAC should be required to produce previous years' records to support modifications of universal service reporting.

[245] *See* 47 C.F.R. § 1.6003(d).
[246] *See 2014 Infrastructure Order* at ¶ 211 ("Further, nothing in this provision indicates that States or local governments must approve requests merely because applicants claim they are covered.").

In addition, some records may not be available to the local government because a different public agency was responsible for the site in the past, such as when the property shifts between county and city control through incorporation, annexation or disincorporation. Likewise, some local governments contract with other public agencies to perform building and encroachment permit functions, and the records associated with those permits may not be transmitted to the lead agency.[247]

Some records may have been destroyed in casualty events. Even digitized records are susceptible to corruption or encryption through malware and ransomware attacks.[248]

Some records may have been destroyed in accordance with the local government's file retention policy (which often follow a state archivist's law or regulations). Such policies often contain exceptions when records may be need needed later, especially as it relates to a potential legal dispute. But the local government would not have reason the retain them because, prior to the *2014 Infrastructure Order*, neither the provisions in the Communications Act related to

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[247] For example, the City of Lakewood, California contracts with the Los Angeles County Department of Public Works for building plan check and permit issuance services. *See Building Plan Check*, City of Lakewood, Cal. (last visited Oct. 29, 2019), https://www.lakewoodcity.org/services/planning/check.asp.

[248] *See e.g.*, Chloe Demrovsky, *Why Ransomware Attacks on Local Governments Matter*, FORBES (Aug. 27, 2019), https://www.forbes.com/sites/chloedemrovsky/2019/08/27/why-ransomware-attacks-on-local-government-matter/#799d4a825de0; Manny Fernandez *et al.*, *Ransomware Attacks Are Testing Resolve of Cities Across America*, N.Y. TIMES (Aug. 23, 2019), https://www.nytimes.com/2019/08/22/us/ransomware-attacks-hacking.html; Cynthia Brumfield, *Why local governments are a hot target for cyberattacks*, CSO ONLINE (May 1. 2019), https://www.csoonline.com/article/3391589/why-local-governments-are-a-hot-target-for-cyberattacks.html; Tod Newcombe, *Small Towns Confront Big Cyber-Risks*, GOV'T TECH., (Oct./Nov. 2017), https://www.govtech.com/security/GT-OctoberNovember-2017-Small-Towns-Confront-Big-Cyber-Risks.html.

personal wireless service facilities nor the Commission's related regulations required local governments to maintain permit records.

Second, unlike state and local governments, applicants do not operate under a shot clock and enjoy the luxury of unlimited time to research archived records for missing permits.

C. Equipment Inventories

Requirements to provide current equipment inventories with the application for an eligible facilities request reasonably relate to whether Section 6409(a) applies.[249] As noted above, whether a tower or base station "exists" for Section 6409(a) purposes depends on whether the support structure and transmission equipment were lawfully deployed.[250]

Unfortunately, and as the Commission already knows, service providers and infrastructure providers do not always follow the applicable zoning or siting process. Just last year, the Commission fined Sprint Corporation and Mobilitie LLC $11.6 million because these firms deployed facilities without the proper permits.[251] Comments throughout other Commission proceedings describe similar misconduct by various other entities (see, for example, **Exhibits A, B, F, G,** and **H** to these comments for examples).

While local officials can easily detect entirely new facilities deployed without proper permits, unauthorized modifications to existing facilities are much harder to

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[249] *See 2014 Infrastructure Order* at ¶ 217.
[250] 47 C.F.R. § 1.6100(b)(5); *see also 2014 Infrastructure Order* at ¶ 174.
[251] *See In the Matter of Sprint Corporation*, Order, DA 18-193 (Apr. 10, 2018); *In the Matter of Mobilitie, LLC*, Order, DA 18-194 (Apr. 10, 2018).

detect. Often the only effective method to assess compliance is to compare the currently deployed facilities to the most recent permit or approval for any inconsistencies. Accordingly, the Commission should decline to find that Section 6409(a) preempts state and local requirements to provide current equipment inventories.

D. Property Owner Authorizations and Title Reports

Requirements to provide property owner authorization and a title report are reasonably necessary documentation needed to demonstrate compliance with many zoning regulations.[252] Again, these are requirements of general applicability, and to provide otherwise would be to grant special privileges to the wireless industry to which no other industry gets to access. Zoning permits typically create property rights that run with the land.[253] These permits may be recorded in official records, and any benefits and burdens associated with the permit bind the property owner and any successor-in-title.[254] Accordingly, local governments have a legitimate interest in ensuring that an applicant either owns the property or has express permission from the property owner.

Written authorization from the property owner is a reasonable requirement because applicants for wireless facility permits almost never own the underlying property.[255] A title report is also a reasonable requirement because it provides

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[252] *See 2014 Infrastructure Order* at ¶ 214 n.595.
[253] *See, e.g.*, *The Park at Cross Creek, LLC v. City of Malibu*, 220 Cal. Rptr. 3d 393, 405 (Ct. App. 2017) ("A CUP is not a personal interest. It does not attach to the permittee; rather, a CUP creates a right that runs with the land.").
[254] *See, e.g.*, *County of Imperial v. McDougal*, 564 P.2d 472, 476 (Cal. 1977).
[255] In instances where the applicant is the property owner, many jurisdictions provide flexible options to demonstrate ownership, such as the deed, a tax bill or other independent verification.

independent verification that the person who signed the authorization in fact owns the property.

WIA suggests that a written authorization should not be required when the site lease permits the modification, but state and local governments are not well-positioned to authoritatively interpret the rights and obligations between third parties to a contract. Aside from the fact that reasonable minds may disagree over what the contract says, other unknown circumstances (such as unrecorded amendments and uncured defaults) may negate even the clearest authorization. WIA essentially asks the local government to interpret the contract and declare the rights and obligations between the parties—a task clearly for the courts and not local planners or building officials.

WIA also suggests that state and local governments should accept "a valid power of attorney" to act on the property owner's behalf.[256] Even if the power of attorney could substitute for a written authorization by the property owner, it would not verify that that the principal identified in the power of attorney in fact owns the property. A title report or some similarly independent source would still be necessary.

VII. LOCAL GOVERNMENTS ALREADY CHARGE COST-BASED FEES FOR ELIGIBLE FACILITIES REQUESTS

WIA petitions the Commission to adopt a rule to require all fees to be cost-based.[257] Western Communities Coalition oppose this proposal as unnecessary

[256] WIA Decl. R. Petition at 22.
[257] WIA RM Petition at 11–13.

because applicable state laws already limit fees to a cost-recovery basis. This includes fees allegedly not based on cost charged by Richmond, California, Beaverton, Oregon, and Thurston County, Washington.[258]

In Colorado for example, courts have interpreted Colorado law to require that all local fees must be based on actual costs. "The amount of a special fee must be reasonably related to the overall cost of the service."[259] Any other formulation is at risk of being held an unlawful tax that violates the Colorado Constitution.[260] Therefore the fees applicants are charged for permitting these facilities are already cost based. To the extent that the Petitioners demand a lowering of these fees then, such a proposal would require local governments (and their taxpayers) to subsidize the wireless industry. We disagree that this is what congress intended when it passed the Spectrum Act. The Commission has previously acknowledged local government arguments that "nothing in the statute requires local authorities to subsidize wireless service providers by internalizing administrative costs."[261]

Many arguments raised by certain Western Communities Coalition members in the Commission's *In re Mobilitie Petition*[262] and *Small Cell Order*[263] proceeding are also applicable to this issue. Rather than restate them here, the Western Communities Coalition attaches those comments as **Exhibit F**, **G** and **Exhibit H** and incorporates them herein by this reference.

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[258] *See id.* at 12–13.
[259] *Bloom v. City of Fort Collins*, 784 P.2d 304, 308 (Colo. 1989). *See also Bruce v. City of Colorado Springs,* 131 P.3d 1187, 1190 (Colo. App. 2005).
[260] *Bainbridge, Inc. v. Bd. of Cty. Comm'rs of Cty. of Douglas*, 964 P.2d 575, 577 (Colo. App. 1998).
[261] *2014 Infrastructure Order* at ¶ 209.
[262] *See generally* Joint Comments In re Mobilitie Petition, *supra* note 12.
[263] *See* Joint Comments In re *Small Cell Order*, *supra* note 30 at 2, 47–49.

CONCLUSION

For all the reasons stated above, the Commission should reject the petitions for declaratory ruling filed by WIA and CTIA and the petition for rulemaking filed by WIA.

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Respectfully submitted,

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